

1992

Procon Corporation v. Utah Department of Transportaion : Brief of Appellant

Utah Court of Appeals

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Robert F. Babcock; Randy B. Birch; Walstad and Babcock; Attorneys for Appellee.

Paul Van Dam; Attorney General; Leland D. Ford; Assistant Attorney General; Attorneys for Appellant.

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BRIEF

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DOCKET NO. 920758

IN THE UTAH COURT OF APPEALS

PROCON CORPORATION,

Plaintiff/Appellee,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant/Appellant.

92-0758-CA

(Supreme Court No. 920190)

Priority No. 16

ADDENDUM TO APPELLANT'S BRIEF

APPEAL FROM JUDGMENT IN THE THIRD
DISTRICT COURT IN SALT LAKE COUNTY,
HONORABLE DAVID S. YOUNG, JUDGE

PAUL VAN DAM
Attorney General
LELAND D. FORD
Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114
Attorneys for Appellant

ROBERT F. BABCOCK
RANDY B. BIRCH
Walstad and Babcock
254 West 400 South, #200
Salt Lake City, Utah 84101
Attorneys for Appellee

NOV 9 1992

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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DESCRIPTION	EXHIBIT NUMBER
Plans (Sheets 2, 3, and 5)	Exhibit 2-P
Bid Proposal, Supplemental Specifications and Special Provision	Exhibit 3-P
Standard Specifications Sections 102.05, 104.02, 105.04, 105.17 and 108.06	Exhibit 5-P
Site Investigation Report--Procon	Exhibit 8-P
Letter dated April 14, 1986 addressed to Hugh Kirkham	Exhibit 18-P
Procon's Original Claim	Exhibit 34-P
Cover Letter--Report by Rollins, Brown and Gunnel	Exhibit 36-P
Gaylord Gardner	Exhibit 61-P
Diaries of Ferd Johnson (not attached)	Exhibit 65-D and Exhibit 66-D

Tab 1

Robert F. Babcock (#0158)
WALSTAD & BABCOCK, P.C.
Attorneys for Plaintiff
254 West 400 South, 2nd Floor
Salt Lake City, Utah 84101
Telephone: (801) 531-7000

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SALT LAKE COUNTY, UTAH

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BY *[Signature]*

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,

:

Plaintiff,

:

COMPLAINT

vs.

:

UTAH DEPARTMENT OF
TRANSPORTATION,

:

Civil No.

C 88-5868

:

Judge

JUDGE DAVID S. YOUNG

Defendant.

:

Plaintiff complains of Defendant and for causes of action
alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff is a corporation authorized and existing under
the laws of the State of Utah, having its principal place of
business in Davis County, State of Utah.

2. Defendant Utah Department of Transportation (hereinafter
"UDOT") is an agency of the State of Utah having its headquarters
in Salt Lake County, State of Utah.

3. The Causes of Action arose out of the construction of
the Clay Hills Pass project located in San Juan County, State of
Utah. Jurisdiction is obtained and venue is properly laid in the
Third Judicial District Court in and for Salt Lake County, State
of Utah.

FIRST CAUSE OF ACTION

4. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs of its Complaint.

5. Plaintiff was awarded the contract by UDOT on the Clay Hills Pass Project in San Juan County, Utah.

6. UDOT breached the subject contract in, among other ways, the following particulars:

- a) UDOT provided defective plans and specifications;
- b) UDOT directed that work be performed by Plaintiff outside the scope of the subject plans and specifications;
- c) UDOT directed that work be performed by Plaintiff contrary to the subject plans and specifications;
- d) Plaintiff encountered conditions different than those represented by UDOT and the subject plans and specifications;
- e) UDOT constructively accelerated the performance of the work of Plaintiff;
- f) UDOT failed to properly administer the subject contract;
- g) UDOT erroneously surveyed the work;
- h) UDOT failed to make timely payments to Plaintiff;
- i) UDOT failed to grant necessary time extensions.

7. Defendant's said breaches of contract have damaged Plaintiff in an amount exceeding \$2,000,000.00.

SECOND CAUSE OF ACTION

8. Plaintiff incorporates by reference each and every allegation contained in the preceding paragraphs of its Complaint.

9. As set forth hereinabove, Plaintiff supplied labor, goods and materials to Defendant by reason of which it has conferred a substantial benefit or value on Defendant.

10. Plaintiff has at all times acted with a reasonable expectation of being duly compensated for the goods and materials which it furnished and not as a volunteer or intermeddler.

11. To permit Defendant to retain the benefit it received without compensating Plaintiff would therefore result in the unjust enrichment of Defendant at the expense of Plaintiff.

12. The reasonable value of the benefit received by Defendants is a sum in excess of \$2,000,000.00, together with interest on said sum.

WHEREFORE, Plaintiff prays for Judgment against Defendant as follows:

1. For a sum in excess of \$2,000,000.00, plus interest, costs and attorney's fees; and

2. For such other and further relief as the Court deems just and proper.

DATED this 1st day of September, 1988.

WALSTAD & BABCOCK, P.C.

By: Robert F. Babcock
Robert F. Babcock

Plaintiff's Address:
P.O. Box 624
Centerville, Utah 84014

10-6-proudot.cpl

Robert F. Babcock (#0158)
WALSTAD & BABCOCK, P.C.
Attorneys for Plaintiff
254 West 400 South, 2nd Floor
Salt Lake City, Utah 84101
Telephone: (801) 531-7000

82C-UT
8:45 AM
Harold E. Babson
FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

SEP 9 2 00 PM '88

CLERK
Katie Shadrich
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION, :

Plaintiff, :

SUMMONS

vs. :

UTAH DEPARTMENT OF
TRANSPORTATION, :

Civil No. C 88-5868

Defendant. :

Judge _____

THE STATE OF UTAH TO THE ABOVE-NAMED DEFENDANT: UTAH DEPARTMENT
OF TRANSPORTATION:

You are hereby summoned and required to file with the Clerk
of the above-entitled Court a written answer to the attached
Complaint, and to serve upon or mail to Plaintiff's attorney,
Robert F. Babcock, 254 West 400 South, 2nd Floor, Salt Lake City,
Utah 84101, a copy of your answer within twenty (20) days, if you
reside within the State of Utah, or thirty (30) days if you reside
outside the State of Utah, after service of this Summons upon you
or within forty (40) days after service upon the commissioner of
insurance if you are an insurer for whom the commissioner is
attorney.

If you fail so to do, judgment by default will be taken
against you for the relief demanded in said Complaint which has

been filed with the Clerk of said Court, and a copy of which is hereto annexed and herewith served upon you.

DATED this 1st day of September, 1988.

WALSTAD & BABCOCK, P.C.

By: Robert F. Babcock
Robert F. Babcock

Serve Defendant At:
UDOT
% Bert Taylor
4501 South 2700 West
Salt Lake City, Utah

10-6-proudof.sum

AFFIDAVIT OF PROOF OF SERVICE

STATE OF UTAH)
): ss.
COUNTY OF)

I hereby certify that I am a citizen of the United States and not a party to or interested in this action and that I served the document entitled 1- Summons - 2 - Complaint on the 2nd day of Sept, 1988, by delivering and leaving the copy of said document with Bert Taylor _____, a person of suitable age and discretion, at the following address: 4501 So. 2700 W- Salt Lake City, Utah _____.

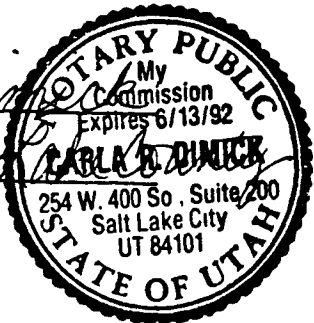
I further certify that on the copy of the document I served, I endorsed the date, place of service, and signed my name and official title, if any, thereto at the time of such service.

DATED this 2nd day of Sept., 19 88.

Harold E. Babcock

SUBSCRIBED AND SWORN to before me, this 2nd day of Sept., 19 88.

Carla R. Simpson
NOTARY PUBLIC
Residing at: Salt Lake City



My Commission Expires:

June 13, 1992

Tab 2

3. Defendant denies the allegations of Paragraph 6 of Plaintiff's Complaint and specifically those allegations contained in Subparagraphs a, b, c, d, e, f, g, h, and i.

4. Defendant denies the allegations of Paragraph 7 of Plaintiff's Complaint and affirmatively alleges that if Plaintiff was in fact damaged in any amount it was through its own incompetence.

5. Defendant in answer to the allegations of Paragraph 8 of Plaintiff's Complaint incorporates its responses as set forth in Paragraphs 1 through 4 as though set forth in full herein.

6. Defendant in answer to Paragraph 9 of Plaintiff's Complaint admits the allegations contained therein to the extent that it is admitted Plaintiff substantially performed most of the contract as required and alleges that Plaintiff was fully compensated for work actually performed.

7. Defendant denies the allegations of Paragraphs 10, 11, and 12 of Plaintiff's Complaint and affirmatively alleges that Plaintiff's performance, such as it was, was required by the contract between the parties and the Plaintiff has been fully compensated for all labor, goods and materials supplied.

8. Defendant affirmatively alleges that Plaintiff breached the terms of the contract by failing to supply an adequate Payment and Performance Bond subsequent to notice by Defendant following the time when Defendant learned that the

bonds initially provided by Plaintiff through Integrity Insurance Company were in fact null and void.

WHEREFORE, Defendant having fully answered Plaintiff's Complaint, prays that same be dismissed, no cause of action, and that Defendant be awarded the relief prayed for in its Counterclaim as follows:

COUNTERCLAIM

1. Defendant and Counterclaimant, Utah Department of Transportation, alleges that the contract between the parties provided for a total of 90 working days in which to complete the work. The contract should have been completed in the early Fall of 1986 even with the addition of several days allowed by reason of overruns in quantity. The contract was terminated prior to completion effective January 1, 1987. As of said date, a total of 56.32 working days had been charged over and above all allowable contract days including extensions. Pursuant to contract specifications, liquidated damages of \$210.00 per working day are to be assessed and Plaintiff is therefore obligated to Defendant and Counterclaimant for a total sum of \$11,827.20.

2. The contract between the parties further provides that the Plaintiff is to identify at the time of bidding how the Disadvantaged Business Enterprise (DBE) goal of 10% is to be satisfied. The Plaintiff was required to identify DBE Contractors, contract work items and dollar amounts of contract

performance which were to have been performed during the contract. The contract further provided that at the time the contract was completed that Plaintiff was to certify the total amount paid to DBE firms and Plaintiff is subject to a liquidated damage to the extent that he fails to satisfy the goal or to obtain a reduction in the goal for reasons specified in the DBE Special Provision. Defendant has not received any certification or request to modify the DBE goal and the goal specified is 10% of the total contract or \$83,739.41. Plaintiff is therefore subject to liquidated damages in the amount of \$83,739.41 for failure to comply with the DBE Special Provision.

WHEREFORE, Counterclaimant prays Judgment by way of Counterclaim against the Counterdefendant for the sum of \$11,827.20 for liquidated damages for time overrun and for \$83,739.41 liquidated damages for failure to satisfy the DBE contract goal requirements, together with interest thereon from January 1, 1987, and such other relief as may be appropriate.

DATED this 3rd day of October, 1988.

DAVID L. WILKINSON
Attorney General



LELAND D. FORD
Assistant Attorney General
Attorney for Defendant and
Counterclaimant Utah Department
of Transportation

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of
the foregoing Answer and Counterclaim was mailed first class,
postage prepaid, to the following this 3rd day of October,
1988:

Robert F. Babcock
WALSTAD & BABCOCK
Attorneys for Plaintiff
254 West 400 South, 2nd Floor
Salt Lake City, Utah 84101

Gurhinde Harris

Tab 3

AUG 9 1991

SALT LAKE COUNTY
By *[Signature]* Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PROCON CORP.,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. 880905868 AA
vs.	:	
UTAH DEPARTMENT OF	:	
TRANSPORTATION,	:	
Defendant.	:	

The above-captioned matter was tried before the Court, sitting without a jury. Trial began on July 9, 1991, and continued through July 12, 1991. The evidence concluded and closing arguments were presented July 16, 1991. The plaintiff was represented by Robert F. Babcock, and the defendant was represented by Leland D. Ford.

The Court having heard the testimony of the witnesses called and the respective arguments of counsel, now renders this its:

MEMORANDUM DECISION

1. The plaintiff was a corporation organized and operating under the laws of the State of Utah and the defendant

is the Utah Department of Transportation (UDOT). The project was known as the "Clay Hills Pass" project. The bid opening was February 4, 1986. The plaintiff was the lowest responsible bidder, having bid \$719,000.00 to complete the project. There were 14 bidders on the project, the lowest of which was rejected for failing to qualify as a "dbe" (disadvantaged business employer), so the contract went to the plaintiff as the second lowest bidder.

2. The State's engineer estimated the project at \$1,078,684.00. All 15 bidders were under the State's estimate.

3. The plaintiff had completed the greatest majority of the work when the bonding company securing the project filed bankruptcy. This imperiled the plaintiff's continued financial performance. The plaintiff was unable or unwilling to otherwise obtain bonding, and left the job.

4. The bid and work to be performed were required due to a subterranean slip and movement in the road. It was anticipated that further slippage could be corrected by cutting deeper into the hillside through performing what is commonly known as "a sliver cut". The bid further required the removing of a knoll, which was referred to as "a daylight cut". The material removed was used in setting fill for the new roadbed

(which was to be moved farther into the hillside and presumably on a stronger bedrock base) and then the balance was to be disposed of in a "waste area." The material in the waste area and fill area had certain compaction requirements of the contractor.

5. The plaintiff alleges that the plans and specifications providing the basis of the bid contain three significant defects. The defects were:

(a) The waste area in the plans was shown to be in the footage area known as "864 plus 25" to the area "867 plus 25" and was different than actually required of the contractor in that the waste was actually placed in the area "867 plus 50 to 871";

(b) The plans called for the dimension of the sliver cut to be 1/2:1 and the project was actually staked at 1:1, requiring a longer, less steep cut, and causing the contractor to encounter more difficult terrain and material; and

(c) The compaction notes regarding any "swell" in the removed material indicated a 5% swell, causing the plaintiff and all others who testified to believe that the material would be fairly easy to remove with appropriate

"ripping" equipment, and would not require "blasting" as a greater percentage swell would indicate.

6. No core samples were taken by the defendant, and the only basis for the swell or shrinkage predictions was that of the experience of a prior contractor in the same area who was able to complete his efforts without blasting.

7. When the plaintiff got into the job, it became apparent that blasting would be required. This resulted due to the hardness of the strata and the fact that there existed insufficient seams to easily break the rock.

8. The witnesses all acknowledge that the project did not go as intended. In fact, the defendant's initial claim for supplemental payment exceeded \$2,000,000.00. While not forming a basis for this decision, the Court notes that the plaintiff actually incurred approximately \$1,600,000.00 in total costs, causing his business to fail, and causing him to not only lose his equity in the business but also his equipment. He further was required to incur an additional \$180,000.00 mortgage against his home.

9. Following the receipt of the claim, the defendant employed an independent team to evaluate the claim who, after being paid \$65,000.00, recommended that the additional amount

of the claim be denied. The Court has reviewed the exhibits and the recommendation of the evaluating group, and rejects the conclusion that the claim should be denied.

10. The Court finds that neither the State nor the plaintiff understood the difficulty the contractor would encounter in performing his work. Since no core samplings were taken, the State could not provide the contractor with sufficient information to draw an adequate conclusion as to the material he might encounter. The reference in the plans to a 5% swell in the waste material would cause any reasonable bidder to determine that the material was relatively soft and easily removable. With the actual experience following blasting yielding just under a 15% swell, that variation was testified to by all engineers who testified to be a significant modification.

11. The determination by the State to move the waste area where the "centroid" of the waste was at least 300 feet farther east than was stated in the plans required virtually all of the material to be trucked. This rendered ineffective the lower cost dozer operation planned where the material was anticipated to be pushed over the embankment into the waste area designated in the plans. This change of the waste area was also a significant modification of the plans.

12. The change in the waste area further compounded the contractor's problem in that it required both a longer push and caused the contractor to be unable to simultaneously "doze and push" while "trucking and filling" the embankment extension.

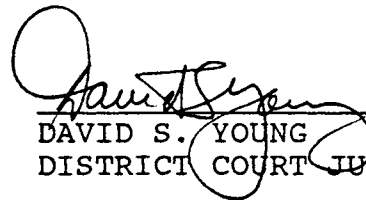
13. The change in the slope of the sliver cuts from 1/2 to 1:1 required cuts of greater heights, rendering narrower widths for work areas. This also increased the number of layers of strata to be encountered. All of this combined to the plaintiff's remarkable disadvantage and constituted a substantial modification of the original plans.

14. Based upon the foregoing, the Court finds that the plaintiff is entitled to additional compensation, to be broken out as follows: \$507,300.00 as a result of the change in the waste area; \$43,750.00 as a result of the change in the slope; \$116,000.00 as a result of the unexpected cost of blasting; \$33,000.00 as a result of the increased overtime necessitated by the unexpected and unknown changes; and \$21,428.00 to be remitted from the retention.

Mr. Babcock is requested to prepare Findings of Fact, Conclusions of Law, and a Judgment consistent with this

Memorandum Decision, and with the evidence presented at trial on matters, if any, which are felt to be further essential to the decision.

Dated this 9th day of August, 1991.



DAVID S. YOUNG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this 9th day of August, 1991:

Robert F. Babcock
Randy B. Birch
Attorneys for Plaintiff
254 West 400 South, Suite 200
Salt Lake City, Utah 84101

Leland D. Ford
Assistant Attorney General
Attorney for Defendant
124 State Capitol
Salt Lake City, Utah 84114

Catherine Hunt

Tab 4

FILED
DISTRICT COURT

OCT 4 1 20 PM '91

PAUL VAN DAM
Attorney General
LELAND D. FORD (1100)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1017
Attorneys for Defendant

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,	:	DEFENDANT'S MOTION TO
	:	RECONSIDER THE DAMAGE
Plaintiff,	:	AWARD AND TO SUPPLEMENT
	:	THE RECORD AND OBJECTIONS
vs.	:	TO PLAINTIFF'S PROPOSED
	:	FINDINGS OF FACT AND
UTAH DEPARTMENT OF TRANSPORTATION,	:	CONCLUSIONS OF LAW
	:	Civil No. 88-5868
Defendant.	:	Judge David S. Young

Defendant, Utah Department of Transportation, by the Attorney General Paul Van Dam, and Leland D. Ford, Assistant Attorney General, respectfully requests that the court pursuant to Rule 59 of the Utah Rules of Civil Procedure reconsider the award of damages in the above-entitled matter for the reasons as stated hereafter and further that the court allow defendant to supplement the record by filing portions of the deposition of Larry Fillmore, by the addition of evidence concerning the charging of liquidated damages for time overrun and the lack of notice to defendant concerning plaintiff's claim for added compensation for extending the waste area.

I. THE AWARD OF DAMAGES IS EXCESSIVE AND THE COURT SHOULD REASSESS THE EVIDENCE AND AWARD A MORE REASONABLE AMOUNT

1. The Court Is Not Obligated To Adopt Either Party's Figures As To Damages But Is Free To Place Its Own Intuitive Value On The Claims.

Plaintiff initially claimed it had damages in excess of \$2.2 million dollars. The fact that its testimony at trial was approximately one-third of that amount does not validate its claims.

The project as originally bid was in the amount of \$719,000. By awarding judgment for an additional \$721,478 the court has effectively doubled the cost of the project to the public. In doing this the court has made defendant responsible not only for defendant's actions in changing the scope of the project, but for the costs and inefficiencies which plaintiff would have incurred regardless of any changes made by the defendant and which are inherent in plaintiff's choice of equipment, method of operation and technique of construction.

The case law in this jurisdiction clearly allows the court to adopt figures as to damages which are based on the court's own view as to what is appropriate. See Even Odds v. Nielson, 448 P.2d 709 (Utah 1968) where the court said the following:

Speaking generally about damages, the desired objective is to evaluate any loss suffered by the most direct, practical and accurate method that can be employed.

We have no disagreement with the proposition that the fact trier should not be permitted to arbitrarily ignore competent, credible and uncontradicted evidence. Nevertheless, he is not bound to slavishly follow the evidence and the figures given by any particular witness. Within the limits of reason it is his prerogative to place his own appraisal upon the evidence which impresses him as credible and to draw conclusions therefrom in accordance with his own best judgment. ... (Citing Arnold Machinery Co. Inc. v. Intrusion Prepakt, Inc. 357 P.2d 496 and Nicol v. Wall, 253 P.2d 355.)

Two cases in which counsel for defendant was involved resulted in so called "jury verdicts" where the court awarded a figure between the figures placed in evidence by the parties. (Thorn Construction Co. v. UDOT, 598 P.2d 365 (Utah 1979)) where Thorn claimed damages of \$38,642.83 and was awarded \$24,500. Also in Schocker v. UDOT, 619 P.2d 1378 (Utah 1980), the contractor's evidence exceeded \$700,000 whereas UDOT conceded some \$40,000. The trial court awarded Schocker approximately \$92,000.

2. The Court's Damage Award Assumes Plaintiff's Bid Was Correct And That All Difficulties Encountered By Defendant Are Chargeable To Defendant.

The Utah Supreme Court has indicated its dislike for the total cost method of asserting damages. (See Highland Construction Co. v. UPRR Co. et al., 683 P.2d 1042 (Utah 1984)). The most obvious reason for rejecting such an approach is that it does not distinguish between those costs, damages, inefficiencies

or other factors which are attributable to the claimant and those which may be the responsibility of the defendant.

The testimony of Gaylord Gardner which the court has chosen to adopt is fraught with the same type of disability as is a total cost claim. It assumes certain conditions existed or did not exist. Since there was no evidence to establish that the assumed conditions existed or occurred on the project in the exact manner assumed, the evidence becomes speculative. On the other hand there is substantial first-hand evidence in the record of mechanical breakdown, delay associated with parts delivery and equipment repair, excessive handling of material, inefficient and poorly planned operations, etc., all by the plaintiff. Clearly most of this is not attributable to the defendant, yet Mr. Gardner's approach to damages makes no allowance for plaintiff's inefficient methods and inadequate equipment but rather makes defendant liable for same.

The most glaring evidence of plaintiff's inefficiencies is in the final stages of the excavation when plaintiff was using scrapers as well as trucks to haul out of the cut which was virtually at grade and when access to the fill was easiest as evidenced by photographs in evidence. Even then plaintiff was unable to achieve production levels consistent with its bid estimate. If the plaintiff was unable to achieve its planned production level when it had reached a stage of completion where the difference in grade between excavation areas and placement

areas was at a minimum, and when it had unrestricted access to the fill area, as well as added hauling equipment, then it is obvious that the plaintiffs concept of operations was poorly conceived and executed. At that stage of construction, plaintiff's planned average production rate should have been exceeded in order to reach any kind of average level of production near to what plaintiff assumed in its bid. Gardner's figures are based on the same concept of operations as plaintiff's concept used to bid the job. They are inherently flawed as a result.

3. Plaintiff Failed To Give Notice Of Its Intention To Claim Added Compensation For Extension Of The Waste Area Placement.

Defendant objected to the introduction of Exhibit No. 18-P which is a letter purportedly signed by Larry Fillmore and dated April 14, 1986. Said letter purports to give defendant notice of plaintiff's intention of claiming compensation for moving the waste disposal area. During the trial, counsel for defendant referred to the fact that Fillmore did not recall the letter nor the subject matter of that letter which relates to the change of location of the waste area when he was questioned regarding same during a deposition taken September 1, 1989. Defendant requests that the pertinent part of Fillmore's deposition which is hereto attached as Exhibit 1 consisting of pp. 1, 2, 49-52, and a copy of the letter be added to the record in order to facilitate the Court's review of this critical issue.

Defendant's counsel inquired of plaintiff's counsel, prior to the trial, whether Fillmore was going to testify and was informed by plaintiff's counsel that they were attempting to serve him with a subpoena. Defendant's counsel expected that Fillmore would testify.

At trial, Hugh Kirkham testified that the letter of April 14, 1986 was not received by him and that no copy was found in defendant's files. Since Kirkham testified he did not receive the letter and Fillmore does not recall the letter nor the events referred to in the letter, defendant submits there is no evidence that the letter was sent nor received except the copy of the letter itself which comes out of plaintiff's files. Without the letter, there is no evidence of notice to defendant of plaintiff's intention to claim added compensation for the change of the waste area location which is required as a predicate under contract specifications for a claim for added compensation. The contract specifications which defendant relies upon are Sections 104.02 and 105.17, copies of which are attached for reference and marked Exhibit 2 but which are both part of Exhibit Number 5-P which was admitted at trial. Section 104.02 allows the engineer to make changes and "alterations in the details of construction," etc. The contractor is required to accept the work as altered unless demand is made for relief. Section 105.17 is referenced in Section 104.02 and requires written notice to the engineer "before he begins the work." The penalty for failure to claim

relief in writing for such changes is a forfeiture of the claim.

Kirkham explained that he staked a slope to support the waste area according to the plan requirements. Granted that most of the slope is outside the specified stationing. However, without any written or verbal notice, the defendant has no way to anticipate or expect that plaintiff will assert a claim and since the plans do call for a two-to-one slope, Kirkham obviously assumed by plaintiff's apparent silence that the extension of the waste area did not pose a problem to the plaintiff.

Defendant submits that in order to recover, the plaintiff has the burden of showing that it gave the requisite notice. Counsel for defendant does not recall any testimony concerning verbal notice of plaintiff's intent to seek relief, and it thus appears that plaintiff's right to recover is wholly contingent upon establishing that the letter of April 14, 1986 was in fact received by defendant.

Due to the critical nature of Exhibit 18-P, the defendant proffers the attached notarized statement, which is marked Exhibit 3, of Roger Talbot, the office manager for Hugh Kirkham at the time pertinent to this project. He states that he did not see the said letter until April 1990 when counsel for defendant provided a copy obtained from plaintiff through discovery. Mr. Talbot routinely received and opened mail addressed to Mr. Kirkham as part of his duties. This proffer is made since counsel represented at the time of trial that neither

Mr. Kirkham nor his officer manager recalled receiving or seeing the letter in question until after the project was terminated and counsel provided a copy for their inspection in April 1990.

Defendant therefore requests the court to reverse its decision to accept Exhibit 18-P as admissible evidence and to rule that plaintiff's entitlement to damages for the change in the waste area location fails due to plaintiff's failure to observe and comply with the requisite notice requirement of the contract.

4. The Testimony Of James Diderickson At Trial Is Contrary To The Facts And His Deposition Testimony And Plaintiff Knew That The Slope Of The Sliver Cut Would Be Changed.

The notes of the pre-bid site visit by Procon's representatives clearly establish that Hugh Kirkham told them that the sliver cut would be excavated at one-to-one and that the existing slopes were one-to-one. The evidence at trial established that the stakes were in place in the cut section and were visible for anyone to see. There was no evidence that the stakes were later changed.

At the deposition of James Diderickson there was no disagreement that Hugh Kirkham had discussed the slope change and stated clearly that the removal would be at a one-to-one angle. In the deposition Didericksen stated that they had called the engineer prior to bid opening to see if there was an addendum concerning the one-to-one slope change. Since this was a

critical issue, Didericksen was asked specifically if he made the call to Kirkham. He then stated that he did not make the call but had instructed Larry Fillmore to do so. Fillmore did not testify at trial and since his deposition occurred prior to Didericksen's, there is nothing in his deposition which refers to the alleged call.

The trial testimony of Didericksen was that the slope angle change was not discussed at the pre-bid site visit. That just is not so. Kirkham testified that he told bidders as they came on the job about the slope change. Didericksen recorded information consistent with that in his notes of the site visit. His deposition testimony did not deny that such conversation took place. Only at trial when Fillmore did not appear to testify as to the alleged phone call talked about during Didericksen's deposition does Didericksen change and allege no discussion took place. This is an obvious attempt to mislead the Court.

The fact that UDOT failed to issue an addendum may be evidence of a breakdown within UDOT as to its engineering practices. What UDOT failed to do is really immaterial in this case insofar as issuing an addendum. Granted it would be preferable but if plaintiff was indeed verbally informed of the change which did occur, then that fact is what is important, not how they were informed. If Procon had not been told of the slope change, it would have grounds to complain. The facts are otherwise. Procon was told and had an opportunity to bid the job

as it was staked and removed. By accepting Didericksen's testimony at trial that it was not discussed, the court is permitting Didericksen to profit by changing his story. In reality, Procon bid with knowledge of the slope angle change and the court's award most likely includes an added recovery for a change that plaintiff knew would occur and should have made allowances for in its bid.

Kirkham clearly did not lie. The facts support his statements. They do not support Jim Didericksen. The award of \$43,750 for added costs in the sliver cut should be deleted at the very least since the only support for it is Didericksen's suspect testimony.

Defendant respectfully suggests that the court should carefully review the deposition testimony of Didericksen, particularly pages 39, 40, 41, 45, and 46, as well as the notes of the site visit made by Didericksen and specifically pages 7, 9, 10 and 11 of Exhibit 8-P. This documentation clearly establishes that the slope angle change was discussed, pre-bid, contrary to Didericksen's story at trial. (See attached Exhibit 4 which includes the pages of the Didericksen deposition as well as the notes of the site visit.)

5. The Court's Award Of Overtime Wages Should Be Deleted.

Defendant respectfully suggests that the award of \$33,000 for overtime wages should be deleted.

In the first place, the project was not completed when it was terminated. At termination, there were 161 working days time that had been charged to the project. (See Weekly Progress Report No. 38 dated December 6, 1986 which defendant requests leave to be submitted as a supplement to the record and which is attached and marked as Exhibit 5.) Defendant does not dispute the fact that plaintiff was entitled to added time and for the sake of argument is willing to concede Kirkham's estimate of 60 days. The initial time allowance was 90 days, so even with an added 60 days plaintiff was still beyond allowable time and the project was approximately 85% complete when terminated as evidenced by the Weekly Progress Report referred to above. Defendant did in fact grant 15 additional days time as evidenced by a worksheet and the final estimate, copies of which are attached as Exhibit 6 and which defendant requests be received as an exhibit. This added time resulted in the net time charge based on 56 days. Even with the additional 45 days to bring the total extension to Kirkham's 60-day estimate, it still leaves 11 days of overtime charges with only 85% of the work complete. Defendant submits the overtime expended by plaintiff merely enabled plaintiff to reach a point where they could shut down for the winter.

Secondly, defendant's counsel agreed in chambers not to press forward with its counterclaim for liquidated damages both for time overrun as well as for failure to achieve the required

DBE performance in deference to time allowed for trial. Based on earlier statements by the court, counsel did not anticipate that the court would award damages of the magnitude and scope which has now occurred. Counsel realizes that in return for dropping its counterclaim that a concession should have been secured to require plaintiff to drop its claim for overtime charges at the least.

Finally, the performance of plaintiff was such that had UDOT not changed the scope of the work and conceding appropriate extensions, the plaintiff would still have exceeded allowable time. The plaintiff should therefore be required to accept responsibility for overtime wages.

6. The Award For Costs Of Blasting Is Excessive

The award of the full amount of plaintiff's claimed costs for blasting is excessive.

UDOT does not tell a contractor how to perform the work. The contractor is expected to make judgments concerning equipment selection, its utilization, construction technique and manpower assignments for himself.

One of the risks in bidding is unknown or changed conditions. In this case, the photographs of the cut section taken before the work, when compared with the photographs taken after the work, clearly rule out any material change let alone anything that would qualify as a "changed condition." The

formations visible before are the same as those visible after. There was no evidence that anything encountered by plaintiff was different from what was visible. Only rarely do contractors enjoy the luxury of being able to see what kind of material they will be working in by having an open cut face to examine.

It is fallacious to suggest that defendant should have provided drilling information. It was already visible and easily investigated. Drilling would not have revealed anything further.

Defendant concedes that the statement concerning "shrink and swell" is subject to interpretation. This is not the type of information that is critical however, since "shrink and swell" is a function of the removal methods selected by the contractor as much as anything. In this sense the statement is meaningless and obviously an opinion. It was suggested by plaintiff's witnesses that the statement would suggest that the material was rippable. Defendant does not disagree that the material was rippable. The previous contractor ripped the material. Defendant is not responsible for the method, equipment or technique a contractor selects if problems subsequently develop absent a demonstrated change of condition which was either unforeseen or not ordinarily encountered.

Plaintiff quite clearly assumed that since the previous contractor ripped the material that he could also. Mr. Clyde's testimony was clearly the best testimony and that is "you pay for it one way or the other." Procon could probably have ripped the

material with heavier equipment but it was probably cost effective to blast some of it. That should not make defendant responsible for the cost of blasting. These are judgment calls which are the responsibility of the contractor since UDOT has a right to expect that a bidder possesses such expertise.

Defendant requests that the court reconsider its award of damages for the cost of blasting. The fact that plaintiff never did use equipment comparable to that used by the earlier contractor appears to have been ignored in the Court's review of this item.

In any event, defendant feels that the court should reconsider its ruling and at the least modify its award rather than assigning full responsibility to the defendants for plaintiff's excessive costs.

OBJECTIONS TO FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Defendant has the following comments and objections relative to the Proposed Findings of Fact and Conclusions of Law as submitted by plaintiff as follows:

A. OBJECTIONS TO FINDINGS OF FACT

1. Finding of Fact Number 2: Defendant does not object to the paragraph as such, except that the Department of Transportation is a Department of the State of Utah, not a Division.

2. Defendant suggests that Finding of Fact Number 10

be changed to read as follows: "The specifications required that the material placed in the waste area be compacted to ninety percent density and the material placed in the roadway embankment be compacted to ninety-five percent density."

3. Defendant suggests that Finding of Fact Number 12 be supplemented by adding the following language: ", and that the material so placed would be sloped at a two-to-one angle."

4. Paragraph 13 of the Findings of Fact should be amended by adding the following sentence: Said material as placed between station 867+25 and 871+50 is sloped at a two-to-one angle to the east and south.

5. Plaintiff objects to paragraph 14 of the Findings of Fact as stated and suggests that the following be substituted: "A plot of the survey data obtained from the state survey performed in November 1988 establishes the fact that waste material was placed beyond the specified stations in the plans and that most of the waste material is located beyond said plan stations.

6. Defendant objects to paragraph 15 of the Findings of Fact since it states a conclusion rather than a fact.

7. Defendant suggests that paragraph 16 of the Findings of Fact be amended by deleting the phrase in the next to the last sentence which reads as follows: "A material error under the circumstances" since it is a conclusion; and finally that the last sentence of paragraph 16 be deleted since the plans

do not purport to designate a centroid for the waste placement.

8. Defendant suggests that the following sentence be added to paragraph 21 of the Findings of Fact: "The State's project engineer testified that he had not seen the said letter until April 1990 and that to his knowledge the letter had not been received by UDOT and no copy of said letter is found in State records."

9. Defendant suggests that the following be added to paragraph 22 of the Findings of Fact: "Hugh Kirkham, UDOT's project engineer, stated in his testimony that in order to place material in the designated waste area it required a two-to-one slope to the east as well as to the south and that most of the waste material was used up in constructing the two-to-one slope to the east. Placement of the waste-filled slope began at a point adjacent to the required and newly constructed embankment for the realigned highway and proceeded to the south and as staked by the defendant.

10. Defendant suggests that paragraph 26 of the Findings of Fact be changed as follows: That the period (.) be changed to a comma (,), and the following be added: although plaintiff's bid notes reflect that the existing slope was one-to-one and the record shows that slope stakes were placed and in evidence at the time plaintiff made its pre-bid site visit, and they were placed to require a one-to-one slope removal.

11. In paragraph 27 of the Findings of Fact, defendant

suggests adding the following sentence: Defendant's project engineer testified that no one associated with Procon called him prior to bid opening about the addenda. Defendant's project engineer, Hugh Kirkham, also stated in his testimony that he informed Procon's representatives as well as all other bidders verbally at the time they visited the project that the slope removal would be at one-to-one in the sliver cut.

12. Defendant objects to paragraph 29 of the Findings of Fact since it is clearly contrary to the deposition testimony of James Didericksen as well as being contrary to Procon's bid notes and to the testimony of Hugh Kirkham.

13. Defendant objects to paragraph 30 of the Findings of Fact in that it is a legal conclusion.

14. Defendant objects to paragraph 31 of the Findings of Fact in that it is contrary to the clear weight of the evidence.

15. Defendant objects to paragraph 33 of the Findings of Fact as stated, specifically the last sentence, since it is contrary to the evidence. The information did not come from the State's Materials Laboratory. The State's materials engineer along with its preconstruction engineer drafted the language based upon their observations of work in the area by previous contractors and based upon their experience and judgment, not upon laboratory tests.

16. Defendant objects to paragraph 35 of the Findings

of Fact in that it is contrary to the evidence. The evidence shows that the plaintiff relied upon the statements of the engineer as to the experience of the previous contractor.

17. Defendant suggests that paragraph 36 of the Findings of Fact be amended by deleting the words "the area" found at the beginning of the last line and substituting therefore "the same cut."

18. Defendant objects to paragraph 37 of the Findings of Fact since it is a legal conclusion.

19. Defendant suggests that paragraph 38 of the Findings of Fact be modified by adding the following: "Testimony by various witnesses for both parties established the fact that material which is blasted tends to swell as much as twenty percent between its original position and its final placement."

20. Defendant objects to paragraph 45 of the Findings of Fact and suggests that it be restated as follows: "The contractor which completed the original project in the Clay Hills Pass ripped the material successfully with a D-9 Caterpillar tractor. Plaintiff used a 155-Kamatsu Dozer with a single ripper and was unable to rip portions of the material. Defendant's witnesses asserted that plaintiff should have been able to rip the material had it used a larger dozer which would approximate the D-9 dozers used by the earlier contractor. This assertion by the State's experts is rejected.

21. Paragraph 47 of the Findings of Fact is not

correct. Project records reflect that as of December 6, 1986, the defendant had charged 161 days. When the final estimate was prepared, 15 additional days were allowed for added quantities. That 15 days, together with the 90 days allowed originally, totalled 105 days, leaving a net of 56 days which were assessed. It should be pointed out that the project was not complete but was in fact eighty-two percent complete as of that time.

22. Defendant objects to paragraphs 48, 50 and 51 of the Findings of Fact. To the extent that the record needs to be supplemented, defendant requests that the court permit defendant to submit copies of the work sheet which supports the final estimate invoice (a copy of which is attached) which is in evidence. The final estimate invoice reflects the addition of the 15 days referred to. Weekly Progress Report No. 38, dated December 6, 1986 lists time charged when the free time period began on December 1, 1986. The fifteen-day credit is apparent when the final estimate total is compared to Progress Report No. 38. (See attached copies.)

Defendant has previously argued in this Motion that the \$33,000 allowed as damages for overtime pay should be eliminated and would refer to that argument as support for the fact that paragraph 51 of the Findings of Fact should be deleted.

B. OBJECTIONS TO CONCLUSIONS OF LAW

Defendant generally objects to the Conclusions of Law for the reasons which are obvious as a result of the objections

to the proposed Findings of Fact as heretofore stated.

23. Specifically, Defendant objects to Conclusion of Law No. 4 and alleges that overtime incurred by the plaintiff should be at its expense and not at the expense of the State.

24. Defendant also objects to Conclusion of Law No. 6 since it did in fact allow a reasonable time extension.

25. Defendant objects to Conclusion of Law No. 7 since the contract mandates that they be assessed for failure to complete the work within allowable time.

26. Defendant objects to paragraph 8 of the Conclusions of Law, specifically as to the amount awarded for the sliver cut, increased overtime and for blasting.

27. Defendant objects to paragraph 9 of the Conclusions of Law and specifically the date for the commencement of interest as being January 1, 1987. In fact, the standard specifications for the State of Utah applicable to the contract provide in Section 109.08 that "when the project has been accepted as provided in subsection 105.16, the engineer will prepare the final estimate of the quantities of the various classes of work performed. After approval of such final estimate, the contractor will be paid the entire sum found to be due after deducting all previous payments and all amounts to be retained are deducted under the provisions of the contract." The final estimate, in fact, was submitted on the 26th day of February, 1988, and interest would run from that date rather than

from January 1, 1987, which is an arbitrary date which was adopted by the parties to terminate the contract with full reservation of all rights to both parties.


SUMMARY

Defendant, by way of summary, requests that the court reconsider the award of damages and eliminate completely any award for overtime wages and for costs involved with excavation in the sliver cut including the \$43,750 for change in the slope and the \$116,000 for costs of blasting. Defendant also submits and requests that the Court consider the attached items of evidence which bear on the requirement for notice by plaintiff to defendant concerning costs associated with the waste area and that Exhibit 18-P be rejected and all relief be denied.

Defendant further requests that the changes to the Findings of Fact and Conclusions of Law be considered by the Court as well.

DATED this 4th day October, 1991.

PAUL VAN DAM
Attorney General


LELAND D. FORD
Assistant Attorney General

CERTIFICATE OF MAILING

I certify I mailed a true and correct copy of the foregoing Motion and Objections to Robert F. Babcock, Walstad & Babcock, attorney for plaintiff, at 254 West 400 South, #200, Salt Lake City, Utah 84101, on this 4th day of October, 1991.

Clara Carr

EXHIBIT 1
FILLMORE DEPOSITION (PARTIAL)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

✕ ✕ ✕

PROCON CORPORATION,)
)
 PLAINTIFF,)
)
 -VS-) CIVIL NO. 8805868
)
 UTAH DEPARTMENT OF)
 TRANSPORTATION,)
)
 DEFENDANT.)
)
 * * *

DEPOSITION OF LARRY FILLMORE

FRIDAY, SEPTEMBER 1, 1989

REPORTED BY:

JANE G. SAVILLE, N.P., C.S.R.

1 BE IT REMEMBERED THAT ON THE 1ST DAY OF
2 SEPTEMBER, 1989, THE DEPOSITION OF LARRY FILLMORE, PRODUCED
3 AS A WITNESS HEREIN AT THE INSTANCE OF DEFENDANT HEREIN,
4 IN THE ABOVE-ENTITLED ACTION NOW PENDING IN THE ABOVE-NAMED
5 COURT, WAS TAKEN BEFORE JANE G. SAVILLE, A CERTIFIED SHORT-
6 HAND REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF
7 UTAH, COMMENCING AT THE HOUR OF 9:10 O'CLOCK A.M. OF SAID
8 DAY AT THE OFFICES OF MR. FORD, ROOM 124, STATE CAPITOL,
9 SALT LAKE CITY, SALT LAKE COUNTY, STATE OF UTAH.

10 THAT THE SAID DEPOSITION WAS TAKEN PURSUANT TO
11 NOTICE.

12 * * *

13
14 A P P E A R A N C E S

15 FOR THE PLAINTIFF: ROBERT BABCOCK
16 HAROLD BABCOCK
17 WALSTAD & BABCOCK
18 ATTORNEYS AT LAW
254 WEST 400 SOUTH, 2ND FLOOR
SALT LAKE CITY, UTAH 84101

19 FOR THE DEFENDANT: LELAND D. FORD
20 ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

21 ALSO PRESENT: VALERIE DIDERICKSEN
22

23 * * *

1 LITTLE KNOB THAT WAS THERE ON THE SOUTH SIDE OF THE ROAD
2 THAT HAD TO BE CUT DOWN AND DAYLIGHTED?

3 A LIKE I SAY, I DON'T RECALL SPECIFICALLY.

4 Q OKAY.

5 A I REMEMBER THE LARGE CUT AND THE LARGE FILL.

6 (WHEREUPON, DEFENDANT'S
7 EXHIBIT C WAS MARKED
8 FOR IDENTIFICATION.)

8 Q (BY MR. FORD) I HAND YOU A COPY OF A LETTER
9 FROM PROCON TO MR. KIRKHAM DATED APRIL 14TH, 1986. I'LL
10 JUST ASK YOU TO LOOK AT THAT AND REFRESH YOUR RECOLLECTION.

11 A OKAY. I'M SORRY, WHAT WAS THE QUESTION ON THAT?

12 Q WELL, LET ME LOOK AT THE LETTER AGAIN. FIRST
13 OF ALL, YOU REFER TO A FOLLOW-UP TO OUR TELEPHONE CONVER-
14 SATION, SO APPARENTLY YOU HAD A CONVERSATION WITH MR. KIRK-
15 HAM ABOUT LARGE MATERIAL WE HAVE ENCOUNTERED IN THE LOCATION
16 DESIGNATED WASTE AREA. DO YOU HAVE AN INDEPENDENT
17 RECOLLECTION OF EITHER OF THESE, OUTSIDE OF THIS LETTER?

18 A I DON'T.

19 Q HAD YOU BEEN ON THE JOB AT OR ABOUT THAT TIME,
20 DO YOU KNOW?

21 A I DON'T RECALL WHETHER--I MEAN, WE WENT DOWN
22 AND VISITED THE JOB TWO OR THREE TIMES, I RECALL AFTER I
23 STARTED, BUT I DON'T EXACTLY KNOW THE TIMEFRAME. I'M AT
24 A LOSS IF I DON'T HAVE MY DIARIES TO RELY BACK ON THESE
25 THINGS.

1 Q SAYS, "AS I STATED, WE HAVE BEEN INFORMED BY
2 BILL THOMAS OF A DIRECTED CHANGE IN THE LOCATION OF THE
3 DESIGNATED WASTE FILL AREA FROM THAT WHICH IS INDICATED
4 ON SHEET 3 OF THE PLANS." DO YOU KNOW WHAT HE'S TALKING
5 ABOUT THERE?

6 A I DON'T. I CAN'T RECALL THE EXACT SPECIFICS
7 ON THAT.

8 Q ALL RIGHT.

9 A I'D HAVE TO, YOU KNOW, REFERENCE IT BACK TO SHEET
10 3 TO BRING THAT BACK IN MY MIND.

11 Q OKAY. LET ME JUST SHOW YOU A DOCUMENT THAT'S
12 CALLED "FIELD REPORTS, MARCH TO DECEMBER 1986, PROCON."
13 I WANT TO KNOW IF YOU KNOW WHOSE HANDWRITING THAT MIGHT
14 BE?

15 A LOOKS LIKE BILL THOMAS'.

16 Q OKAY.

17 A LET'S SEE, LOOK AT IT CLOSER.

18 Q ALL RIGHT.

19 A YEAH, IT'S NEAT LIKE BILL'S. HE'S PRETTY NEAT.

20 (WHEREUPON, THE TAKING OF THE DEPOSITION WAS
21 BRIEFLY INTERRUPTED.)

22 Q (BY MR. FORD) ON MARCH 19TH HIS NOTE INDICATES,
23 "WE CAN MAKE SWITCHBACKS LONGER NOW THAT WASTE AREA TO SOUTH
24 IS TO BE EXPANDED." DO YOU KNOW WHETHER THAT HAS ANYTHING
25 TO DO WITH THE COMMENT IN YOUR LETTER WHICH OCCURS ABOUT

1 A MONTH LATER CONCERNING THE DIRECTED CHANGE IN THE LOCATION
2 OF THE WASTE FILL AREA?

3 A I DON'T.

4 Q SO HOW MANY TIMES WOULD YOU ESTIMATE YOU ACTUALLY
5 VISITED THE PROJECT AFTER WORK BEGAN DOWN THERE AND BEFORE
6 YOU LEFT THE EMPLOY OF PROCON?

7 A I WOULD PROBABLY SAY TWO THAT--TWO TIMES
8 PROBABLY.

9 Q AND WAS THAT BY YOURSELF OR WAS THAT IN THE
10 COMPANY OF SOMEONE ELSE?

11 A I'M SURE JIM WAS--I CAN'T RECALL. I DON'T THINK
12 I WENT DOWN JUST ON MY OWN.

13 Q UH-HUH.

14 A THAT I RECALL. BUT I MIGHT HAVE.

15 Q DO YOU RECALL CONFERRING WITH MR. KIRKHAM ON
16 ANY OF THOSE OCCASIONS?

17 A NOT PARTICULARLY, NO, I DON'T.

18 Q CAN YOU RECALL HOW FAR ALONG THE PROJECT WAS
19 OR WHAT THEY WERE DOING ON THE SPECIFIC DAYS THAT YOU
20 VISITED?

21 A I REMEMBER STANDING IN THE CUT AREA AND THAT
22 THEY HAD QUITE A BIT OF THE INITIAL FILL BROUGHT DOWN TO
23 THE BOTTOM, AND THEY WERE STARTING TO BRING UP THE OTHER
24 SLOPE. SO THE WASTE AREA WAS--QUITE A BIT OF THAT WAS
25 FILLED IN WHERE THE SLOPES OF THE ROADS WERE STARTING TO

1 BE LESS AS THEY HAD TO COME UP. SO THAT WAS, YOU KNOW,
2 HOW LONG INTO THE PROJECT? I DON'T RECALL EXACTLY. IT
3 PROBABLY WOULD REFLECT IN BILL'S REPORT WHEN I DID OR DIDN'T
4 COME TO THE JOB. I'M NOT SURE.

5 Q I COULDN'T SPOT ANYTHING.

6 A OH, OKAY.

7 Q I DIDN'T SPECIFICALLY HIGHLIGHT IT, SO . . .
8 DO YOU RECALL WHEN YOU WENT TO THE PROJECT WHETHER WORK
9 WAS PROCEEDING THE WAY YOU HAD PERCEIVED THAT IT WOULD WHEN
10 YOU--

11 A LIKE I SAY, I THINK I WAS JUST INVOLVED RIGHT
12 AT THE VERY FIRST PORTION OF IT, AND IT SEEMED LIKE IT WAS
13 PROCEEDING. WE FELT IT WAS GOING TO GO SLOW RIGHT THERE
14 AT THE FIRST AND THEN WE HAD ANTICIPATED A HIGH RATE OF
15 PRODUCTION AT THE TAILEND TYPE OF SITUATION. SO I DON'T
16 RECALL ANYTHING SPECIFICALLY RIGHT NOW.

17 MR. FORD: OKAY. WELL, COUNSEL, I BELIEVE THAT'S
18 ALL THE QUESTIONS I'VE GOT.

19 R. BABOCK: OKAY. IF WE CAN TAKE A COUPLE
20 MINUTES AND CONFER WITH ALL OF MY NOTE TAKERS.

21 (WHEREUPON, A RECESS WAS TAKEN.)

22 * * *

23 R. BABOCK: I DON'T HAVE ANY QUESTIONS.

24 (WHEREUPON, THE TAKING OF THE DEPOSITION WAS
25 CONCLUDED AT 11:00 O'CLOCK A.M.)

FILE COPY

**PROCON CORPORATION
P.O. BOX 177
North Salt Lake, Utah 84054**

April 14, 1986

**Mr. Hugh Kirkham, P.E.
UTAH DEPARTMENT OF TRANSPORTATION
South Highway 191(#79)
Blanding, Utah 84511**

RE: Clay Hills Pass.

Dear Hugh:

As a follow-up to our telephone conversation concerning the large material we have encountered and the location of the designated waste area.

We consider the material encountered between sta. 864 to 867 to be a change in subsurface conditions from that which is indicated on the plans and which was indicated in the pre-bid tour.

As I stated we have been informed by Bill Thomas of a directed change in the location of the designated waste fill area from that which is indicated on Sheet 3 of the bid plans. These changes will us impact us significately; therefore, we will keep track of costs and inform you as to the impact at a later date once they have been determined.

We are looking forward to providing you with the best of our ability and developing a good working relationship with you.

If there are any questions, please feel free to contact me.

Sincerely,

**Larry W. Fillmore
Director of Operations**

**cc: J. Didericksen
File**

00140

Handwritten signature and initials

EXHIBIT 2
SECTIONS 104.02 AND 105.17

103.04 Return of Proposal Guaranty: All proposal guaranties, except those of the two lowest bidders, will be returned immediately following the opening and checking of the proposals. The retained proposal guaranty of the second lowest bidder will be returned within 15 days following the award of contract or within 30 days after the opening of the bids, and that of the successful bidder will be returned after satisfactory bonds have been furnished and the contract has been executed.

103.05 Requirement of Contract Bonds: At the time of the execution of the contract, the successful bidder shall furnish a performance bond and a payment bond in a sum equal to the full amount of the contract. The bonds shall be on forms provided by the Department.

103.06 Execution and Approval of Contract: The contract shall be signed by the successful bidder and returned together with the contract bonds within 10 days after the contract has been awarded. If the contract is not executed by the Commission within 15 days after receiving signed contracts and bonds, the bidder shall have the right to withdraw his bid without penalty. No contract shall be considered as effective until it has been fully executed by all of the parties thereto.

103.07 Failure to Execute Contract: Failure to execute contract and file acceptable bonds within 10 days after the contract has been awarded shall be just cause for the cancellation of the award and the forfeiture of the proposal guaranty which shall become the property of the Department, not as a penalty, but in liquidation of damages sustained. Award may then be made to the next lowest responsible bidder or the work may be readvertised and constructed under contract or otherwise, as the Department may decide.

SECTION 104—SCOPE OF WORK

104.01 Intent of Contract: The intent of the contract is to provide for the construction and completion in every detail of the work described. The Contractor shall furnish all labor, materials, equipment, tools, transportation and supplies required to complete the work in accordance with the plans, specifications, special provisions, and terms of the contract.

104.02 Alteration of Plans or Character of Work: The Engineer reserves the right to make at any time during the progress of the work, such increases or decreases in quantities and such alterations in the details of construction, including alterations in the grade or alignment of the road or structure or both, and the elimination of one or more items as may be found necessary or desirable. Such alterations shall not be considered as a waiver of any conditions of the contract nor invalidate any of the provisions thereof nor release the surety. The Contractor agrees to accept the work as altered the same as if it had been a part of the original contract, provided, however, that if demand is made in writing by either party to the contract, a supplemental agreement will be necessary before any alteration is made which involves any one of the following:

1. An extension or shortening of the length of the project of more than 25%.
2. An increase or decrease of more than 25% of the total cost of the work, calculated from the original proposal quantities at the unit contract prices.
3. An increase or decrease of more than 25% in the quantity of any major contract item except "Excavation for Structures" and "Piles."
4. A change in the nature of the design or in the character of construction which measurably increases or decreases the unit cost of performing any item of the work.

Supplemental agreements may be made without obligation to notify the bonding company.

In all other cases, the work involved in any changes shall be performed on the basis of the contract unit prices and no supplemental agreement shall be necessary.

When alterations of plans or character of work occur requiring a supplemental agreement, the agreement shall be prepared, specifying the work to be done, adjustment and/or extension of contract time, if any, and the basis of compensation for such work. *The Contractor shall proceed with the work upon receipt of an approved supplemental agreement, or when*

ordered in writing or verbally by the Engineer. Verbal orders must be confirmed in writing within one working day.

The adjustment in compensation provided for under conditions (2) and (3) above, in the event of an increase, shall be computed on the amounts or quantities in excess of 25% allowable alteration. In the event of a decrease, any adjustments in payment shall apply to the quantity or quantities of work actually performed.

In the case of decreased quantities of work, no allowance shall be made in the supplemental agreement for anticipated profits.

Written requests for a supplemental agreement under condition (4) shall set forth in detail the particulars and character by which the work was changed and by what amounts the unit costs of the contract items will be altered. The failure of the Engineer to recognize a change in the character of the work when ordering alterations in the work shall in no way be construed as relieving the Contractor from his duty and responsibility for filing a request for supplemental agreement.

If a request for additional compensation is made by the Contractor and the Engineer does not consider that a change, as ordered, will measurably increase or decrease the unit cost of performing the work, he may order the work to proceed at the contract prices. The validity of the claim will be considered in accordance with provisions in Subsection 105.17.

When it is determined by the Engineer that under the provisions of this subsection, a supplemental agreement is justified and an agreement satisfactory to both parties cannot be made, the Engineer may determine an amount which he feels is fair and equitable, and order the Contractor to proceed accordingly, or may order the work performed on a force account basis or cancel the work from the contract. If the work is performed at the adjusted price as established by the Engineer and the Contractor considers additional compensation is due him, he may request further consideration as provided in Article 105.17.

Any delays attributable to approval of changes from design plans that may appear necessary or desirable during construc-

tion shall not be cause for payment to the Contractor for any additional expense incurred by such delays.

104.03 Extra Work: The Contractor shall perform work, for which there is no price included in the contract, whenever it is deemed necessary or desirable in order to complete fully the work as contemplated. Such work shall be performed in accordance with the specifications and as directed, and will be paid for as provided under Subsection 109.04.

104.04 Maintenance of Traffic: Unless otherwise provided, the road while under construction shall be kept open to public traffic by the Contractor. Pot holes and other irregularities that develop under traffic shall be repaired as directed. The Contractor shall also provide and maintain in a safe and usable condition temporary connections or crossings and intersections with trails, roads, streets, businesses, parking lots, residences, garages and farms. The Contractor shall maintain a smooth-riding, dust-controlled surface at all times, 24 hours a day and 7 days a week.

Watering shall be applied in the amount ordered and/or bituminous material shall be applied as directed for dust control.

Bituminous material *ordered* by the Engineer for dust control will be paid for at the contract unit price for bituminous material shown in the proposal. If no item for bituminous material is shown in the proposal, the work will be paid for as provided in Subsection 109.04.

The Contractor shall provide for two-way traffic through construction operations, except where conditions warrant, as determined by the Engineer, one-way traffic will be allowed. One-way traffic provisions shall apply when fresh bituminous material is being placed, when half-width pavement is being laid, or when necessary due to construction operations. The Contractor shall furnish adequately trained flagmen, warning signs and warning lights, and if necessary, pilot cars for the safe control of traffic. During suspension of work, two-way traffic operations shall be provided. All traffic control devices shall be in accordance with MUTCD.

Snow removal will not be required by the Contractor for traffic service. Watering, or bituminous material used for dust

All cost of maintenance work during construction and before the work is finally accepted will not be paid for separately, but the cost shall be included in the unit prices bid for the various pay items.

105.15 Failure to Maintain Roadway or Structure: If the Contractor, at any time, fails to comply with the provisions of Subsection 105.14, the Engineer will immediately notify the Contractor of such noncompliance. If the Contractor fails to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the Engineer may immediately proceed to maintain the project and the entire cost of this maintenance will be deducted from the monies due the Contractor on his contract.

105.16 Acceptance: (a) **Partial Acceptance:** If at any time during the prosecution of the project, the Contractor satisfactorily completes a unit or portion of the project, and such unit or portion is deemed necessary for the convenience of traffic, such as a structure, an interchange, or a section of road, he may request the Engineer to make final inspection of that unit. If the Engineer finds upon inspection that the unit has been satisfactorily completed in compliance with the contract, he may make written acceptance of that unit as being completed and the Contractor may be relieved of further responsibility for that unit. Such partial acceptance shall in no way void or alter any of the terms of the contract.

(b) **Final Acceptance:** Upon due notice from the Contractor of presumptive completion of the entire project, the Engineer will make an inspection. If all construction provided for and contemplated by the contract is found completed to his satisfaction, that inspection shall constitute the final inspection and the Engineer will make the final acceptance and notify the Contractor in writing of this acceptance as of the date of the final inspection.

If, however, the inspection discloses any work, in whole or in part, as being unsatisfactory, the Engineer will give the Contractor the necessary instruction for correction of same, and the Contractor shall immediately comply with and execute such instructions. Upon correction of the work, another inspection will be made which shall constitute the final inspection provided the work has been satisfactorily completed. In such event, the Engineer will make the final acceptance

and notify the Contractor in writing of this acceptance as of the date of final inspection.

105.17 Claims for Adjustment and Disputes: If, in any case, where the Contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the Engineer as extra work as defined herein, the Contractor shall notify the Engineer in writing of this intention to make claim for such additional compensation before he begins the work on which he bases the claim. If such notification is not given and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as required, then the Contractor hereby agrees to waive any claim for such additional compensation.

Such notice by the Contractor, and the fact that the Engineer has kept account of the cost as aforesaid, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim after consideration by the Engineer is found to be just, it shall be paid as extra work as provided herein for force account work. Nothing in this subsection shall be construed as establishing any claim contrary to the terms of Subsection 104.02.

SECTION 106—CONTROL OF MATERIAL

106.01 Source of Supply and Quality Requirements: The materials used on the work shall meet all quality requirements of the contract. In order to expedite the inspection and testing of materials, the Contractor shall notify the Engineer of his proposed sources of materials prior to delivery. At the option of the engineer, materials may be approved at the source of supply before delivery is started. If it is found after trial that sources of supply for previously approved materials do not produce specified products, the Contractor shall furnish materials from other sources.

106.02 Local Material Sources: (a) **Proposed Sources:** Possible sources of local materials may be designated on the plans and described in the special provisions. The quality of materials in such deposits will be acceptable in general, but the Contractor shall determine for himself the amount of equipment and work required to produce a material meeting

EXHIBIT 3
AFFIDAVIT OF ROGER TALBOT

AFFIDAVIT OF ROGER TALBOT

STATE OF UTAH)
)ss
COUNTY OF GRAND)

ROGER TALBOT, being first duly sworn on his oath,
deposes and says:

1. That I am a resident of Grand County, State of Utah.
2. That I have been employed by the Utah Department of Transportation for twenty-eight years and that during 1986 I was assigned as the office manager for Hugh Kirkham, Resident Engineer. Among my duties was receiving, reviewing, filing and responding to mail addressed to Mr. Kirkham and to the project office.
3. To the best of my knowledge, the letter dated April 14, 1986, purportedly written by Larry W. Fillmore, a copy of which is attached and made a part hereof, was never received in the office. Said letter was not received by me and was never filed in the project correspondence file.
4. I do not know of anyone else who would have likely received mail except myself and Mr. Kirkham.
5. The first time I became aware of the said letter or the contents thereof was in April 1990 when Mr. Leland Ford of the Attorney General's Office inquired of Mr. Kirkham and I

concerning the content of the letter.

This was in connection with the preparation of responses to interrogatories submitted by Procon. To my knowledge this was the first time Mr. Kirkham had seen the letter as well as myself.

FURTHER AFFIANT SAYETH NAUGHT.

ROBERT TALBOT

SUBSCRIBED AND SWORN TO before me this ____ day of
October, 1991.

NOTARY PUBLIC

My Commission Expires:

EXHIBIT 9

EXHIBIT 4
DEPOSITION OF JAMES DIDERICKSEN (PARTIAL)

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

3 * * *

4 PROCON CORPORATION,)
5 PLAINTIFF,)
6 -VS-) CIVIL NO. 8805868
7 UTAH DEPARTMENT OF) JUDGE: DAVID S. YOUNG
8 TRANSPORTATION,)
9 DEFENDANT.)
10)

11 * * *

12
13 DEPOSITION OF JAMES DIDERICKSEN

14
15 DECEMBER 8, 1989
16
17
18
19
20
21
22
23
24
25

JANE G. SAVILLE, C.S.R.

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Salt Lake City, Utah
Machine-generated OCR may contain errors.

00152

1 BE IT REMEMBERED THAT ON THE 8TH DAY OF DECEMBER,
2 1989 THE DEPOSITION OF JAMES DIDERICKSEN, PRODUCED AS A
3 WITNESS HEREIN AT THE INSTANCE OF THE DEFENDANT HEREIN, IN
4 THE ABOVE-ENTITLED ACTION NOW PENDING IN THE ABOVE-NAMED
5 COURT, WAS TAKEN BEFORE JANE G. SAVILLE, A CERTIFIED
6 SHORTHAND REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF
7 UTAH, COMMENCING AT THE HOUR OF 9:05 O'CLOCK A.M. OF SAID DAY
8 AT THE OFFICE OF MR. LELAND D. FORD, ROOM 124 STATE CAPITOL,
9 SALT LAKE CITY, STATE OF UTAH.

10 THAT THE SAID DEPOSITION WAS TAKEN PURSUANT TO
11 NOTICE.

12 * * *

13
14 A P P E A R A N C E S

15
16 FOR THE PLAINTIFF:

WALSTAD & BABCOCK
BY: HAROLD BABCOCK AND
DARREL J. BOSTWICK
ATTORNEYS AT LAW
254 WEST 400 SOUTH
SECOND FLOOR,
SALT LAKE CITY, UT 84101

20 FOR THE DEFENDANT:

UTAH STATE ATTORNEY GENERAL'S OFFICE
BY: LELAND D. FORD
ATTORNEY AT LAW
236 STATE CAPITOL
SALT LAKE CITY, UT 84114

23 ALSO PRESENT:

VALERIE DIDERICKSEN

24
25 * * *

1 Q OKAY. I BELIEVE IT WAS ONE TO ONE. NOW, YOU WERE
2 INFORMED THAT THE REMOVAL WOULD BE ON A ONE TO ONE AT THE
3 TIME OF THE SITE VISIT, WEREN'T YOU?

4 A I THINK MR. KIRKHAM TOLD US THAT, AND THEN WE WENT
5 BACK, I THINK WE WERE ON THE 29TH. AND MONDAY BEFORE THE BID
6 OPENING WE THOUGHT HE WAS GOING TO ISSUE A WRITTEN ADDENDUM.
7 AND I BELIEVE LARRY FILLMORE AND MYSELF CALLED TO SEE IF
8 THERE WAS ANY CHANGES, IF THERE WAS ANY CHANGES IN THE JOB OR
9 SHOULD WE BID IT AS DRAWN, AND MR. KIRKHAM SAID, "BID IT AS
10 DRAWN." AND SO WE BID IT WITH A HALF TO ONE, IF I RECALL
11 RIGHT. AND I'M NOT AWARE OF ANY ADDENDUMS THAT ISSUED A
12 CHANGE.

13 Q THE EXISTING SLOPE WAS WHAT, DO YOU KNOW?

14 A I'M NOT SURE. I CAN'T RECALL WHAT THE EXISTING
15 SLOPE WAS.

16 Q DIDN'T MR. KIRKHAM TELL YOU?

17 A WHAT THE EXISTING SLOPE WAS?

18 Q UH-HUH.

19 A I DON'T BELIEVE THAT HE TOLD US WHAT THE EXISTING
20 SLOPE WAS. HE COULD HAVE, BUT I DON'T RECALL THAT.

21 Q IT WOULDN'T MAKE MUCH SENSE IF THE EXISTING SLOPE
22 WAS ONE TO ONE, IT WOULDN'T MAKE MUCH SENSE TO CUT 20 FEET
23 INTO THE HILL AND PUT IT ON A HALF TO ONE, WOULD IT?

24 A I DIDN'T DESIGN IT.

25 Q NO, BUT I'M ASKING YOU.

1 A I GUESS THIS IS WHERE I MAKE A STATEMENT, IS I
2 DON'T ANTICIPATE AND DON'T TRY TO OUT THINK THE ENGINEERS. I
3 THINK IF THERE IS A MISTAKE OR IF I DID THAT I WOULD GET IN
4 SERIOUS TROUBLE. AS I SAID, I'M RELYING ON THE WARRANTY OF
5 THE PLANS.

6 Q WELL, DID YOU ASK HIM WHEN YOU SPOKE TO HIM ON THIS
7 MONDAY THAT YOU SAID BEFORE THE BID OPENING, DID YOU TELL HIM
8 THAT YOU WANTED TO KNOW WHETHER THERE WAS A CHANGE
9 SPECIFICALLY AS TO THE SLOPE?

10 A WE ASKED HIM IF THERE WAS ANY CHANGES TO THE BID
11 PLANS OR SHOULD WE BID THEM AS THEY ARE DRAWN, AND HE SAID --
12 IF I RECALL, HE SAID, "THERE IS NO CHANGES, BID IT AS DRAWN."
13 AND THAT'S -- THAT WAS, AS I RECALL, WAS HIS WORDS TO US.

14 Q BUT HE'D ALREADY TOLD YOU ON A SITE VISIT THAT IT
15 WAS GOING TO BE REMOVED ON A ONE TO ONE. DID YOU POINT OUT
16 THERE WAS A CONFLICT IN THE PLANS?

17 A WELL, WHAT I REMEMBER, MR. FILLMORE TALKED TO HIM
18 ON THE PHONE. I WAS IN THE BID OFFICE WITH THEM AND I
19 REMEMBER MR. FILLMORE SAYING, INDICATED IT WAS ONE TO ONE. "
20 IS IT ONE TO ONE, OR SHOULD WE BID IT AS DRAWN ON THE PLANS?"
21 AND MR. KIRKHAM SAID BID IT -- "TO BE SAFE, TO BE SAFE BID IT
22 AS DRAWN ON THE PLANS."

23 Q NEVERTHELESS, YOU AGREE THAT YOUR BID NOTES SAY --

24 A HE DID SAY THAT ON THE JOB TOUR. I REMEMBER HIM
25 SAYING THAT ON THE JOB TOUR. WHEN WE ASKED HIM, HE SAID TO

1 BE SAFE BID IT AS DRAWN.

2 Q DID YOU MAKE ANY NOTATIONS IN YOUR BID WORK-UP,
3 ESTIMATE, OR ANYTHING AS TO THAT TELEPHONE CONVERSATION?

4 A I DID SOMEWHERE, WROTE IT DOWN SOMEPLACE. I
5 USUALLY DO.

6 Q HERE'S YOUR BID NOTES AND CALCULATIONS, HERE'S YOUR
7 SITE INVESTIGATION REPORT. IF WE COULD HAVE THOSE MARKED AS
8 GROUP EXHIBITS I'LL ASK YOU TO FIND THEM IN THERE FOR ME.

9 (WHEREUPON, DEFENDANT'S EXHIBIT 1, PARTS 1 AND 2,
10 WERE MARKED FOR IDENTIFICATION.)

11 A THEY COULD HAVE BEEN WRITTEN ON A SET OF THE
12 DRAWINGS OR A SET OF OTHER NOTATIONS FOR MY PURPOSES.
13 OFFHAND CAN'T SEE WHERE IT IS ON THOSE. BUT I RECALL GETTING
14 THAT INFORMATION. AS I SAID, THERE IS NO ADDENDUM WHICH
15 INDICATED OTHERWISE THAT I RECALL RECEIVING. USUALLY THAT'S
16 THE STANDARD PRACTICE AT LEAST FOR ME, IS CALLING THE
17 ENGINEER TO SEE IF THERE HAS BEEN ANY CHANGES, OR IF THEY
18 WERE GOING TO FOLLOW UP WITH ANY CHANGES AND ADDENDUMS I MAY
19 HAVE MISSED.

20 Q (BY MR. FORD) WELL, I'M REFERRING HERE TO
21 DEFENDANT'S EXHIBIT 1, PART 1, PAGE SEVEN THERE IS A LIST OF
22 THE QUESTIONS. QUESTION 1 SAYS "PLANS AND PROFILES VERY
23 UNCLEAR AND CONFUSING. CLARIFY AS TO CUT AND FILL, PLACEMENT
24 AND LOCATION OF ITEMS." DOWN AT THE BOTTOM OF THE PAGE IT
25 SAYS "RESPONSE. 1. MR. KIRKHAM, P.E., POINTED OUT CUT AREA

1 BY SHOWING CENTER LINE STAKES. CUT SLOPE ONE TO ONE TO TOP,
2 APPROXIMATELY 200 FEET. FILL GORGE 200 FEET DEEP. PLANS
3 DIFFICULT TO READ." NOW, IT CLEARLY INDICATED IN HERE THAT
4 HE TOLD YOU NOT ONLY ONE TO ONE, BUT THAT IT'D BE
5 APPROXIMATELY 200 FEET UP IN THE AIR.

6 A UH-HUH.

7 Q IF YOU CUT IT ON A HALF TO ONE YOU WOULDN'T BE
8 NEARLY THAT HIGH, WOULD YOU?

9 A WELL, I DIDN'T MEASURE IT, YOU SEE. THAT WAS ON
10 --I TOOK HIS WORD AT THAT TIME. AS I SAID, WE WENT BACK AND
11 WAS WAITING FOR EITHER AN ADDENDUM OR NOTIFICATION ONCE LARRY
12 POINTED OUT THE FACT THAT IT WAS HALF TO ONE. THAT'S MY
13 RECOLLECTION. AND THE ENGINEER -- IT'S BEEN MY EXPERIENCE,
14 LEE, THAT THE ENGINEERS TELL YOU ONE THING, AND IF THEY DON'T
15 FOLLOW UP WITH AN ADDENDUM THAT YOU CAN'T USE -- YOU KNOW,
16 SOME OF THE THINGS THEY TELL YOU HAS TO BE FOLLOWED UP WITH
17 AN ADDENDUM. IF THERE'S A CHANGE IN THE PLANS -- MAYBE HE
18 MISREAD THE PLANS. MAYBE HE WAS ANTICIPATING SOMETHING
19 WITHOUT REVIEWING THE PLANS. THAT'S HAPPENED MANY, MANY
20 TIMES.

21 I THINK THAT'S WHAT CAUSED THE ADDITIONAL QUANTITY
22 FROM THE 175 ON THE DESIGN OF THE BID, IS IT WAS CHANGED TO A
23 ONE TO ONE AND THEY DIDN'T -- THEY ISSUED A SUP ORDER FOR
24 THAT ADDITIONAL YARDAGE BUT NOT THE CHANGE IN THE SLOPE.

25 Q REFERRING TO PART 2 OF EXHIBIT 1, WHICH IS ENTITLED

1 A WELL, FROM THE DOCUMENTS THERE AND FROM WHAT MY
2 RECOLLECTION WAS IS THE FACT THAT WE DIDN'T BID IT OTHER THAN
3 WHAT THE DRAWINGS SHOWED WE WERE GOING TO BID, ON A ONE TO
4 ONE, UNTIL WE GET CORRECTED BY MR. KIRKHAM.

5 Q BUT DID YOU MAKE IT CLEAR TO MR. KIRKHAM IN THIS
6 ALLEGED CONVERSATION THAT YOU WERE GOING TO BID THE ROADWAY
7 EXCAVATION AND THE SLIVER CUT ON A HALF TO ONE?

8 MR. BOSTWICK: I THINK HE'S ALREADY ANSWERED THAT.

9 MR. FORD: WELL, I DIDN'T HEAR HIM ANSWER IT YES OR
10 NO.

11 MR. BOSTWICK: HE INDICATED THAT HE ASKED
12 SPECIFICALLY WHETHER OR NOT THEY SHOULD GO WITH WHAT HE TOLD
13 THEM ON SITE, OR WHETHER THEY SHOULD GO WITH THE PLANS, AND
14 THEY WERE TOLD TO BID IT ON THE PLANS.

15 Q IS THAT YOUR ANSWER?

16 A HE SAID, "TO BE SAFE BID AS DRAWN." MR. KIRKHAM
17 MADE A STATEMENT AFTER WE STARTED ABOUT THE DESIGN ERROR.

18 Q OKAY. ON PAGE 10 OF EXHIBIT 1, PART 1 IT'S CALLED
19 "DESCRIBE SITE." THEN YOU'VE GOT SOME NOTES HERE. IT SAYS
20 "HIGH DEGREE OF ERROSION, CUT AREA BEGINNING AT SLIVER CUT
21 APPROXIMATELY 200 FEET ABOVE EXISTING ROAD. MAINTAIN
22 APPROXIMATELY ONE TO ONE SLOPE. PLANS VERY VAGUE AND
23 CONFUSING. ACCESS ROAD MUST BE BUILT TO BOTTOM OF FILL USING
24 MATERIAL ON EAST END OF CUT." YOU WOULD AGREE WITH ME THAT
25 THAT VERY CLEARLY SAYS ONE TO ONE?

A I THINK THAT'S THE BID NOTES THAT I TOOK IN THE FIELD OR, YOU KNOW, THAT I RECALL FROM THE FIELD WHEN I CAME HOME. THAT'S WHAT MR. KIRKHAM HAD INDICATED, AS I INDICATED.

Q ON THE NEXT PAGE, IS THIS YOUR HANDWRITING?

A I BELIEVE SO, YEAH.

Q YOU HAVE A DIAGRAM SHOWING THE CUT AREA, AND THIS IS THE SLIVER CUT ON THE LEFT HERE, ISN'T IT?

A UH-HUH.

Q SAYS "200 FEET TOP, ONE TO ONE SLOPE"?

A UH-HUH. IT'S ALL FROM THE BID TOUR.

Q WELL, AS A RESULT OF YOUR CONVERSATIONS WITH KIRKHAM, AND SPECIFICALLY THE FACT THAT HE TOLD YOU THAT IT WAS GOING TO BE REMOVED ON A ONE TO ONE SLOPE, DID YOU ANTICIPATE THAT THE ROADWAY EXCAVATION ITEM WOULD OVERRUN?

A NO.

Q YOU KNEW THE PLANS WERE DRAWN ON A HALF TO ONE?

A I FIGURED THAT IF THEY WERE GOING TO ISSUE -- IF IT WAS COMING OUT ONE TO ONE THEY WOULD ISSUE AN ADDENDUM THAT WOULD INDICATE ANY OVERRUN, IF IT WAS A CHANGE IN THE PLANS FIGURED THERE WOULD BE AN OVERRUN AND THEY WOULD ISSUE AN ADDENDUM STATING THE FACT. AND THEY NORMALLY DO. AND I'VE BEEN INVOLVED WITH PROJECTS SINCE THEN THAT THEY DO COME OUT WITH ADDITIONAL COMPLETE SET OF BID DOCUMENTS.

Q EVEN THOUGH THE STANDARD SPECIFICATIONS ALLOW THEM TO OVERRUN AN ITEM BY 25 PERCENT YOU'RE TELLING ME THAT THEIR

c. Discuss general job requirements (Check when completed).

Notes: ~~excavating~~ Slide and fill materials from

- Non-tension area - Rebuilding traffic or roadway from slide area - Place fill in 200' deep gouge next to existing embankment - No rock should be encountered - Clay material - hard - but - Reppable - needs effort - Possible extra work involved - A. Slablike slide of - Ten feet or below subgrade - Access biggest problem - Water source close

d. Clarify questioned items in specifications (Check when complete).

Questions:

1. Plans + Profile - very unclear + confusing - Clarity as to cut + fill, placement + location of items
2. Water sources + Cost - Distance from Project
3. Rock excavation + Blasting - How much if any - What location (Note Station location on Plan)
4. What caused slide, Ground stable, any special requirements for handling materials
5. Traffic Runs + Problems - Any Safe Reports or Signs studied - done in project execution

Responses:

1. Mr. Kerkham, P.E. pointed out cut area kept showing - Centerline of road cut slope - Lil. to Top - Approx 200' fill gouge 200' deep - Plan - 0.4 units to area.
2. Water sources pointed out - Tracking some trail - work for water with Proctor (improving Morgan trail)

1. Examine all cores and logs of test holes available. (Check when complete.)

Comments: No test holes made - dense bed 2 feet into bed area - 30 ft - Project Engineer explained no solid materials should be encountered - all ripable with medium effort - Previous Contractor Original Required no blasting - flashers contained in fill 3' max.
(Use extra sheets if necessary)

2. General discussion of geology.

Notes: Materials - Clay - medium to hard - no blasting needed - Ripable - Some boulders - flashers - Project Engineer indicated previous Contractor required no blasting - Shovel cut about 200' above existing highway U.D.O.T. will not pay for over cut - Some needed gulley on left side need to be done level Access Rd Required to bring fill to base of placement - 8 ft 5% swell shown on plans, new seismic studies, but only 5% swell shows no blasting anticipated. Excavation volumes

A) Common: 125,400 - BCY; 5% swell Factor noted on Plans
B) Rock: None - BCY; 5% swell Factor - 5% in some areas.

Common Materials description: Clay materials - breakable by hand - Some boulders 1-3' - material must - Shale - some still missing - P.E. indicates possible water wet - may be required to stabilize blow - subgrade material 8-11%
Rock Description: 3' maximum - flashers may be found in excavation - Areas indicated on Plans as solid are not according.

Project Engineer - Hugh Kirkham 1-29-86
No soils test or log drill holes done, no seismic studies available - 8 ft plans indicate 5% swell in solid material - which is not correct - no blasting or heavy ripping needed.
Machine-generated OCR may contain errors.
Water Content Test, 20% water content @ present.

Loadability of soil. Plan notes indicate a

5% swell factor & 95% loadability plus some shrink of 5% indicating a 105% factor probably because of moisture.

Traffic, congestion, obstacles Lake Howell Traffic heavy during construction day Possibly a faster summer - medium - work area should not affect traffic

Grades - Steep - on way across land requires some delay factor has looked over & grade 40% Drainage Poor, but should not be factor

Underfoot - Possibly unstable at Lake Spring weather may cause problem

Compaction - 100% of soil to be compacted in 90% waste

→ % of compaction shrink in fill Approx 10-15% No Soils Reports available See Table for clay to 95%

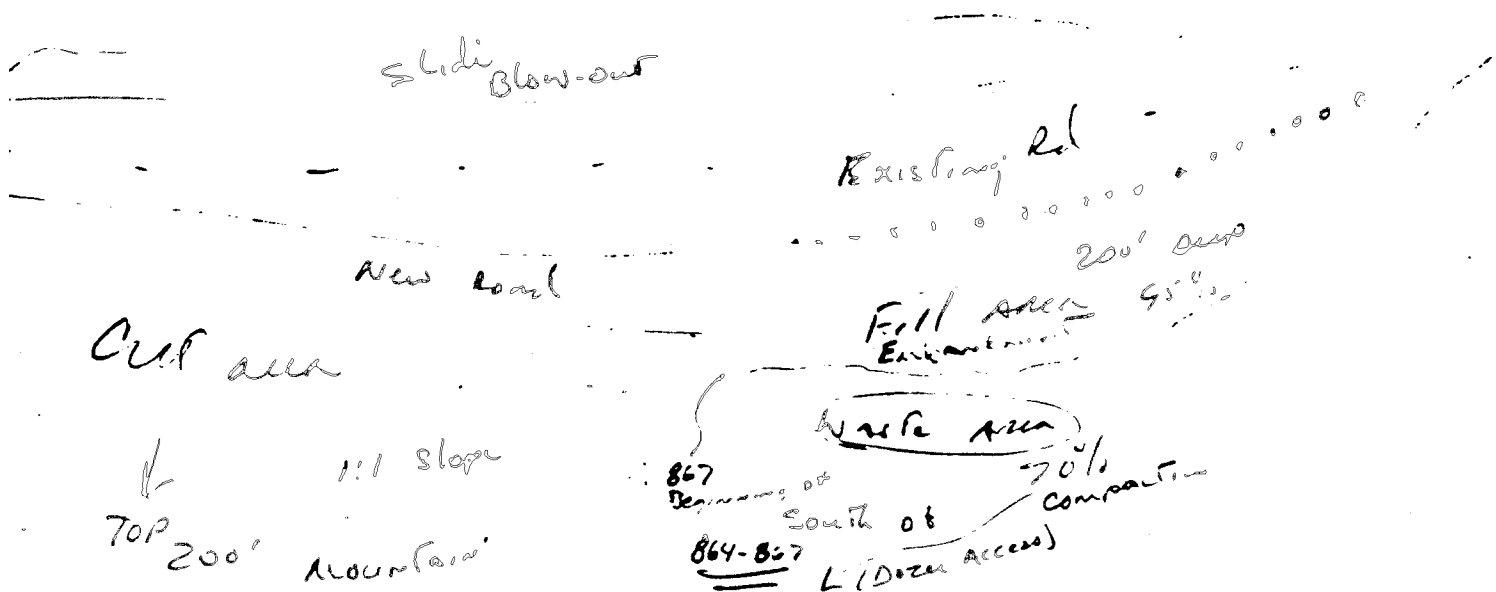
1. General site photographs of all work areas: general construction areas; extent of clearing and grubbing required; include map of location in relation to state highways and staging areas

Notes: Existing highway running approx East & West - end of construction area from beginning approx 855+00

South Side Underneath large existing hill of 1/2 acre. Materials Shuttling to land. High degree of erosion cut area beginning at Silver Cut approx 200' above east Rd. Mainline approx 1:1 slope

Plan very ^{large} and confusing. Access must be built to bottom of fill using material on road (Dover) Access road should be built

For access to top of Silver Cut - Use backhoe (no pay for Dike Cut). Fill area steep & 200' deep (See photos). Access problem delay on cycle times Steep grade may need push-pull scrapers or DFB's to handle yarder Top load scrapers with h.h. Waste area waste so at daylight could be handled by h.h.



19. Determine availability of water both potable and construction:

Notes: Project requires indicated source of water. Area 3 miles from Job site. Another approx 6 miles. P.E. indicated may not need much water material. Contains between 8-11% Moisture. Previous contractor needed very little. H2O. Distance 3-6 miles.

20. Work camp (if required):

- Recommend location: Hand Hall Quarry
- Nearest utilities: Same
- Distance from worksite: 22 miles

21. Recommend location of contractor's staging area:

- Locate office, shops and sheds: North side of road
West end of project

EXHIBIT 5

WEEKLY PROGRESS REPORT NO. 38 DATED DECEMBER 6, 1986

ATION	% THIS WEEK	% TO DATE	DATE BEGAN	DATE COMPLETED	COMMENTS
00100	0	99	3/18/86		11/30/86- Sunday-no work.
		100	11/05/86	11/25/86	12/01/86- Ripping, loading & hauling roadway exc. to waste area, hauling UBC, also laying UBC.
	0	0	11/24/86		12/02/86- Exc. ditches, hauling UBC, finishing subgrade.
					12/03/86- Hauling & laying UBC.
					12/04/86- Loading & hauling roadway exc. to waste area, hauling & laying UBC.
					12/05/86- Loading & hauling roadway exc. to waste area, hauling & laying UBC.
					12/06/86- Hauling & laying UBC.
ous	0	48	3/18/86		No time charge during December, January, and February refer to spec.s section 108.06 b.

TIME ALLOWANCE		DATE EXPIRED	RECOMMENDATIONS	FIRST ACTUAL WORKING DAY	
DAYS	REFERENCE				
90	CONTRACT 3/11 19 86			CONTRACT TIME BEGINS	3/18/86
	LETTER 19			DAYS CHARGED PREVIOUSLY	161
	LETTER 19			TOTAL DAYS INCL. THIS WEEK	161
				PERCENT OF TIME ELAPSED	180
WORK SUSPENDED PARTIAL		TOTAL		PERCENT OF CONTRACT COMPLETED	82
WORK RESUMED				DATE CONTRACT WAS COMPLETED	

OFFICIAL VISITS		
DATE	OFFICIAL	OBJECT OF VISIT

EXHIBIT 6
WORKSHEET AND FINAL ESTIMATE

CONTRACTOR: Procor Corporation
 PROJECT NO. ER-052(1) LOCATION: Day Hills Pass
 ACT DATE: 3/11/86 CONTRACT WORK STARTED: 3/18/86 CONTRACT WORK COMPLETED: TERMINATED 11/16
 Lme:
 Verified 90. Working Days
 Extension 1 " "
 Extension Contract overrun 109,338.12 = 15.2% of 13.68 " "
 Total Days Provided 114.68 Working Days
 Total Days Charged 161 " "
 Net (Overrun/Underrun) 56.32 " "

Estimate Received: 2/12/88 To Data Processing: 2/16/88 Returned: _____

Financial
 Original Contract \$ 719,000.00
 Final Estimate \$
 " " \$
 " " \$
 Final Estimate Total \$
 Net (Overrun/Underrun) = 16.47 % \$ 837,394.12
118,394.12

ITEM	DOLLAR AMOUNTS		DOLLAR VARIATION		REMARKS
	ORIG. CONTR.	FINAL EST.	AMOUNT	%	
Base Contract	438,500.00	514,487.50	75,987.50	17.33	
Change	4,160.00	10,218.00	6,058.00	145.62	SA# 2
Total Base Contract	12,375.00	26,622.79	14,247.79	120.48	SA# 2
Change	39,512.50	45,572.50	6,060.00	15.34	SA# 2
Change	39,000.00	23,085.00	5,615.00	15.17	

TRAFFIC: approved supplemental agreements

ER OR UNDERRUNS: Project Engineers Letter

ADVIS: Against the Contractor by State Liquidated Damages for overruns
in contract times 56.32 days @ \$210 / day = 11,827.20
 Against the State by the Contractor Contractor 18% liquidated to not
submit a claim for removal of conditions

REQUIRED FORMS AND LETTERS:
 FINAL ESTIMATE INVOICES; FINAL INSPECTION REPORT FORM R-99; MEMORANDUM OF EXPLANATION
 UNITS OR UNDERRUNS; MATERIALS CERTIFICATION.
SEE FORM = 2 73,739.41 VOID = 0

Constructed plans and field books were X available when checking the final estimate
 The typed final estimate was mailed to the Contractor 2/26/88 for
 receipt and approval. The required number of copies were returned properly approved on _____

STATE ROAD COMMISSION OF UTAH
Final Inspection Report

Part 1

Form R-99
Sheet one
10/9/59

Utah August 06 19 87

Final inspection of work performed by Procon Corporation, on
(Contractor)

ER-052(1), Clay Hills Pass
Project No. Project Name made 8/06 87 by

The undersigned and the following B.P.R., County, City and R.R. representatives.

FHWA

For the ~~BOPOR~~ John R. Baxter, Title Const. & Maint. Engr.

For the State Arthur R. Chidester, Title Deputy Const. Engr.

State

For the ~~Contractor~~ Ken Adair, Title Dist. Const. Engr.

For the State Jay Lyman, Title Const. Tech.

The project ~~was~~ completed satisfactorily ~~not~~ in conformity with the plans and
specifications, and ~~is~~ up to our standard of construction, and I recommend that

it be accepted with (a) reservations shown on back of this form. Progress has been
as) slow as shown by the following data:

Notice to begin dated 3/11/86; Work actually started 3/18/86.

Time counted beginning with 3/21/86; Work suspended 1/01/87; because of

* See note on back of sheet; Work was resumed */ */; Work was completed

*/ */; except as shown on back (a) of this sheet; Time charged against Con-

tractor to and including 12/19/86; and no time should be counted after this date.

Time granted the Contractors:

90 working* calendar*, days by contract dated 3/11/86:

0 working* calendar*, days extension by

0 working* calendar*, days extension by

90 working* ~~calendar~~*, days total time granted to 12/19/86;

161 working* ~~calendar~~*, days total time charged against Contractor

71 working* calendar* days total overrun*, ~~under~~

or notes applying to above reference marks, see bottom of sheet two.

or list of major structures, see bottom of sheet two.

ESTIMATE NO. 13 FINAL

CONTRACTOR'S NAME: PROCON CORPORATION
 CONTRACTOR'S ADDRESS: BOX 624
 CENTERVILLE, UTAH 84014

PROJECT-NO. ER-052(1)
 CLAY HILLS PASS

COUNTY: SAN JUAN DISTRICT 4
 AUTHORITY NO. 5759

DATE ESTIMATE IS TYPED OR WRITTEN IN FIELD: 00/00/00

NUMBER	ITEM DESCRIPTION	DET EST QUANTITY	UNIT	PRICE	TOTAL WORK DONE TO 08/13/87 QUANTITY	AMOUNT	WORK DONE SINCE LAST EST QUANTITY	AMOUNT
	A-GRAD, DRAIN, BIT SUR							
0010	MOBILIZATION	1	LUMP	59174.0000	1.000	59174.00		
0020	FLAGGING	3000	HOUR	13.0000	2545.000	33085.00		
0030	ROADWAY EXCAVATION	175400	CU YD	2.5000	205795.000	514487.50		
0040	ROAD MIX BITUMINOUS SURFACE COURSE 3/4" MAXIMUM	1450	TON	32.0000				
0050	BITUMINOUS MATERIAL GRADE MC-800	76	TON	314.0000				
0060	BIT MATERIAL GRADE MC-70 OR MC-250	10	TON	377.0000				
0070	BITUMINOUS ADDITIVE	380	LB	1.3000				
0080	UNTREATED BASE COURSE 3/4" OR 1" MAXIMUM	2780	TON	22.0000	2281.250	50187.50		
0090	SEEDING	5	ACRE	476.0000	9.953	4737.63		
0100	MULCHING TYPE "B"	5	ACRE	560.0000	9.953	5573.68		
0110	RIGHT-OF-WAY MARKER	12	EACH	67.0000	12.000	804.00		
0120	HIGHWAY TRAFFIC PAINT	27	GAL	62.0000				
0130	DELINEATOR TYPE I	48	EACH	15.0000				
0140	BEAM GUARDRAIL (WOOD POST)	2110	LN FT	12.4000	1175.000	14570.00		
0150	GUARDRAIL APPROACH ELEMENT (WOOD POST)	4	EACH	448.0000	4.000	1792.00		
0160	PAVEMENT SAWING (BITUMINOUS)	56	LN FT	8.0000				
0170	24" CORRUGATED STEEL PIPE CULVERT	250	LN FT	32.0000				
0180	24" METAL END SECTIONS	2	EACH	528.0000				
0190	24" PIPE CULVERT S.A. NO. 1	0	LN FT	40.0000	50.000	2000.00		
0200	24" METAL END SECTION S.A. NO. 1	0	EACH	528.0000	1.000	528.00		
0210	6" CORRUGATED POLYETHYLENE UNDERDRAIN (PERFORATED S.A. #2 SUPPLIER)	0	TON	5.6500	252.900	1428.89		
0220	UNTREATED BASE COURSE S.A. #2 (SUPPLIER)	0	TON	4.7500	1543.350	7330.91		
0230	ROAD MIX BITUMINOUS SURFACE COURSE S.A. #2 (SUPPLIER)	0	TON	4.7500	1672.400	7943.90		
	SUBTOTAL A-GRAD, DRAIN, BIT SUR					703643.01		0.0

B-EQUAL OPP TRAINING

00171

CONTRACTOR'S NAME: PROCON CORPORATION
 CONTRACTOR'S ADDRESS: BOX 624
 CENTERVILLE, UTAH 84014

PROJECT-NO. ER-052(1)
 CLAY HILLS PASS

COUNTY: SAN JUAN DISTRICT 4
 AUTHORITY NO. 5759

DATE ESTIMATE IS TYPED OR WRITTEN IN FIELD: 00/00/00

NUMBER	ITEM DESCRIPTION	DET EST QUANTITY	UNIT	PRICE	TOTAL WORK DONE TO 08/13/87 QUANTITY	WORK DONE TO 08/13/87 AMOUNT	WORK DONE SINCE LAST EST QUANTITY	WORK DONE SINCE LAST EST AMOUNT
0010	E E O TRAINING	1000	HOUR	0.8000	812.000	649.60		
	SUBTOTAL B-EQUAL OPP TRAINING					649.60		0.00
0010	C-STOCKPILE MATERIAL							
0020	WOOD GUARDRAIL POSTS	122	EACH	14.2000	122.000	1732.40		
0030	WOOD GUARDRAIL BLOCKS	130	EACH	2.7000	130.000	351.00		
	STATE SALES TAX	1	LUMP	130.2100	1.000	130.21		
	SUBTOTAL C-STOCKPILE MATERIAL					2213.61		0.00
0010	D-S.A. #2 UDOT							
0020	FLAGGING	320	HOUR	13.0000	786.000	10218.00		
0030	ROAD MIX BITUMINOUS SURFACE COURSE 3/4" MAXIMUM	1450	TON	27.2500	1672.400	45572.90		
0040	BITUMINOUS MATERIAL GRADE MC-800	76	TON	314.0000	65.205	20474.37		
0050	BIT MATERIAL GRADE MC-70 OR MC-250	10	TON	377.0000	11.355	4280.84		
0060	BITUMINOUS ADDITIVE	380	LB	1.3000				
0070	UNTREATED BASE COURSE 3/4" OR 1" MAXIMUM	700	TON	17.2500	1543.350	26622.79		
0080	HIGHWAY TRAFFIC PAINT	27	GAL	62.0000	23.000	1426.00		
0090	DELINEATOR TYPE 1	48	EACH	15.0000	35.000	525.00		
	6" CORRUGATED POLYETHYLENE UNDERDRAIN (PERFORATED)	950	LN FT	27.2100	800.000	21768.00		
	SUBTOTAL D-S.A. #2 UDOT					130887.90		0.00
	SUMMARY							
	A-GRAD, DRAIN, BIT SUR					703643.01		0.00
	B-EQUAL OPP TRAINING					649.60		0.00
	C-STOCKPILE MATERIAL					2213.61		0.00
	D-S.A. #2 UDOT					130887.90		0.00

ESTIMATE INVOICE
ESTIMATE NO. 15 FINAL

CONTRACTOR'S NAME: PROCON CORPORATION
CONTRACTOR'S ADDRESS: BOX 624
CENTERVILLE, UTAH 84014

PROJECT-NO. ER-052(1)
CLAY HILLS PASS

COUNTY: SAN JUAN DISTRICT 4
AUTHORITY NO. 5759

DATE ESTIMATE IS TYPED OR WRITTEN IN FIELD: 00/00/00

NUMBER	ITEM DESCRIPTION	DET EST QUANTITY	UNIT	PRICE	TOTAL WORK DONE TO 08/13/87 QUANTITY	AMOUNT	WORK DONE SINCE LAST EST QUANTITY	AMOUNT
--------	------------------	---------------------	------	-------	---	--------	--------------------------------------	--------

TOTAL VALUE OF WORK DONE TO AND INCLUDING 08/13/87					837394.12		0.0	
PLUS AMOUNT PREVIOUSLY RELEASED TO STATE ESCROW							21427.92	
LESS PREVIOUS PAYMENTS					815966.20			
LESS AMOUNT PREVIOUSLY RELEASED TO STATE ESCROW					21427.92		21427.92	
LESS LIQUIDATED DAMAGES FOR OVERRUN IN CONTRACT TIME								
56.32 DAYS AT \$210.00/DAY					-11827.20		-11827.20	
LESS LIQUIDATED DAMAGES FOR FAILURE TO MEET DBE GOAL					-83739.41		-83739.41	

AMOUNT DUE UDOT	-74138.69	-74138.69
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MADE BY: CHECKED IN S.L. OFFICE BY: CNL 1-26-88

PROJ. ENGINEER: HUGH KIRKHAM

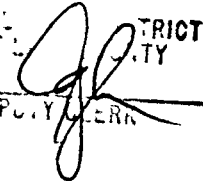
APPROVED CONST. EST & AGREEMENTS SUPERVISOR: *James L. Middleton*

APPROVED ENGINEER FOR CONSTRUCTION: _____

FILED
DISTRICT COURT

OCT 4 1 25 PM '91

PAUL VAN DAM
Attorney General
LELAND D. FORD (1100)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1017
Attorneys for Defendant

THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY 
DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,	:	DEFENDANT'S OBJECTION
	:	TO PLAINTIFF'S COST
Plaintiff,	:	MEMORANDUM
	:	
vs.	:	
	:	
UTAH DEPARTMENT OF TRANSPORTATION,	:	
	:	Civil No. 88-5868
Defendant.	:	Judge David S. Young

COMES NOW the defendant, Utah Department of Transportation, by the Attorney General, Paul Van Dam, and Leland D. Ford, Assistant Attorney General, and respectfully moves the court for an Order Denying Costs to the plaintiff.

Said motion is based upon the authority of the case of Tracy v. Peterson, 1 Utah 2d 213, 265 P.2d 393 (Utah 1954). Said case construes Utah Code Ann. § 78-27-13 which provides for the source of payment for costs which may be awarded against the state. Said case makes clear the fact that the said section is not authority for the payment of costs by the State. There is no statute which authorizes the taxation of costs against the State and since costs were not taxable against the sovereign under common law, there is no authority for the Court to award

plaintiff costs absent a statute to that effect.

Even if costs were taxable against the defendant, the defendant would object to the inclusion of deposition costs listed in plaintiff's memorandum for Gunnell, Price, Clyde, and Kirkham since they all appeared and testified at trial. In the case of Hull v. Goodman, 290 P.2d 245 (Utah 1955) the court held that where the witnesses appeared and testified at trial the costs of the depositions were not properly includable in the cost bill.

The most recent cases have held that it must be demonstrated that the depositions were reasonably necessary and that they were used at trial. The depositions of Fillmore and Thomas were taken by defendant and plaintiff did not use either of them at trial. Defendant would therefore object to the cost of those depositions if the defendant were liable for costs. The cases which defendant relies upon are Lloyd's Unlimited v. Nature's Way Marketing, Ltd., 753 P.2d 507, 512 (Utah App. 1988) and Highland Cost. Co. v. UPRR, et al., 683 P.2d 1042, 1051 (Utah 1984).

RESPECTFULLY SUBMITTED this 4th day of October, 1991.


LELAND D. FORD
Assistant Attorney General

CERTIFICATE OF MAILING

I certify I mailed a true and correct copy of the foregoing Objection to the plaintiff's attorney, Robert F. Babcock, Walstad & Babcock, 254 West 400 South, #200, Salt Lake City, Utah 84101, on this 4th day of October, 1991.

Wral Can

Tab 5

Robert F. Babcock #0158
Randy B. Birch #4197
WALSTAD & BABCOCK
Attorneys for Plaintiff
254 West 400 South, #200
Salt Lake City, Utah 84101
Telephone (801) 531-7000

FILED DISTRICT COURT
Third Judicial District

MAR 06 1992

By SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,	:	
	:	
Plaintiff,	:	ORDER ON DEFENDANT'S MOTIONS
	:	
vs.	:	
	:	
UTAH DEPARTMENT OF	:	Civil No. 8805868
TRANSPORTATION,	:	
	:	Judge David S. Young
Defendant.	:	

The Defendant's Motion to Reconsider the Damage Award, Motion to Supplement the Record, Objection to Plaintiff's Cost Memorandum and Objection to Plaintiff's Proposed Findings of Fact and Conclusion of Law came on for hearing before the Honorable David S. Young, on February 14, 1992. Plaintiff was represented by counsel Robert F. Babcock. Defendant was represented by counsel Leland D. Ford. The Court reviewed the memorandum of the parties and heard oral argument by the respective parties.

The Court, after hearing argument of counsel, reviewing its findings, the memorandum decision, and the record, finds as follows:

1. That the Court has found persuasive the testimony of Gaylord Gardner as it related to damages and that there is no need to adjust the final figures as determined by the Court;

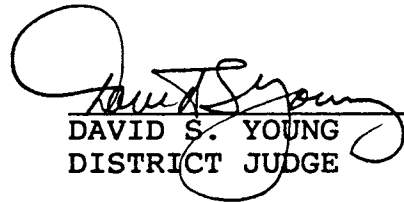
2. The Court will supplement the record and allow the submission of the Exhibits attached to Defendant's Motion to Supplement the record, numbered 1, 5, and 6.

3. The Findings of Fact and Conclusions of Law as revised by the Plaintiff are approved and should be submitted in final form.

4. Defendant's objection to Plaintiff's Cost Memorandum is granted. Plaintiff is not to be awarded its costs in this matter.

Dated this 6th day of ~~February~~ ^{MARCH}, 1992.


BY THE COURT:



DAVID S. YOUNG
DISTRICT JUDGE

CERTIFICATE OF HAND DELIVERY

I certify that on this 26 day of February, 1992, I caused a true and correct copy of the foregoing to be hand delivered to Leland D. Ford, Assistant Attorney General 4120 State Office Building, SLC, UT 84114.



4-misc order.306

Tab 6

MAR 06 1992

SALT LAKE COUNTY

By Deputy Clerk

Robert F. Babcock #0158
Randy B. Birch #4197
WALSTAD & BABCOCK
Attorneys for Plaintiff
254 West 400 South, #200
Salt Lake City, Utah 84101
Telephone (801) 531-7000

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,	:	
	:	
Plaintiff,	:	FINDINGS OF FACT and
	:	CONCLUSIONS OF LAW
vs.	:	
	:	
UTAH DEPARTMENT OF	:	Civil No. 8805868
TRANSPORTATION,	:	
	:	Judge David S. Young
Defendant.	:	

The subject case came on for trial before the Honorable David S. Young, sitting without a jury. The trial began on July 9, 1991 and continued through July 12, 1991. Closing arguments were presented July 16, 1991. Plaintiff was represented by Robert F. Babcock of and for Walstad & Babcock. Defendant was represented by Leland Ford. The Court having considered the objections of Defendant Utah Department of Transportation to the proposed findings of fact and conclusion of law, and after considering the evidence, both oral and documentary, presented by the parties and the arguments of the respective counsel the Court now makes the following:

FINDINGS OF FACT

1. Plaintiff was a corporation organized and operating under the laws of the State of Utah properly licensed and qualified to do

business as a contractor in the State of Utah.

2. Defendant is the Utah Department of Transportation, a department of the State of Utah, hereinafter referred to as the "State."

3. The State prepared plans and specifications to widen and realign a portion of State Highway 276 known as Clay Hills Pass in San Juan County. The project was required due to a subterranean slip and movement of the road.

4. The bids were submitted and opened on Feb. 4, 1986. Fourteen bids were submitted to the State.

5. The State's estimate of the project was \$1,078,684. All fourteen bids submitted were less than the State's estimate.

6. The lowest bid submitted was rejected by the State due to problems of that bidder in meeting the DBE (Disadvantaged Business Enterprise) requirements set forth in the specifications.

7. Plaintiff's bid of \$719,000 was the second lowest bid; Plaintiff was accepted by the State as the lowest responsive and responsible bidder.

8. The contract between Plaintiff and the State was executed on March 11, 1986.

9. The project consisted of excavating into an existing cut slope to widen the roadway and allow the alignment to be moved off of the existing settling roadway embankment, to a stable newly excavated cut area. A portion of the excavated material was to be used as an embankment for the new road. The balance of the excavated material was to be disposed of in an area designated in

the plans as the "waste area."

10. The specifications required that the material placed in the waste be compacted.

11. The fact that the specifications had a compaction requirement for the material placed in the waste area did not mean that a bidder should anticipate that the material would be placed in a location other than that in the plans as the designated waste area.

12. The plans clearly designated that the waste was to be placed "right of station 864+25± through 867+25±".

13. After the project was bid, the contract signed, and work commenced, Plaintiff was directed and required by the State to place the waste material to the right between station 867+50 and station 871+50.

14. A plot of the survey data obtained from the State's survey performed in November of 1988 substantiated Plaintiff's claim that the waste area was in fact moved and was contrary to the State's position that the waste area was not materially changed.

15. The plot of survey data obtained from the State's survey performed during construction known as "road calc" clearly shows that the waste area was in fact moved. The data shows no waste between station 864 + 25 and 867 + 25. Rather, the data shows the waste does not appear until station 867 + 50. The "road calc" data is contrary to the State's position that the waste area was not materially changed.

16. Neither the State's personnel nor its experts actually

calculated the location of the actual centroid of the placed waste material. Rather, the State's experts' approximation of the location of the centroid was off by approximately 200 feet, a material error under the circumstances. The centroid of the actual waste area was over 300 feet further east than the midpoint of the waste area as shown on the plans.

17. The actual waste area was, in large part, in a deeper portion of the terrain than was the designated waste area. The actual waste area also had coves that hindered the work of Plaintiff in placing and compacting the material.

18. The change in the designated waste area was a significant modification of the plans.

19. Plaintiff had planned and anticipated on using a dozer operation in pushing material into the waste area. The change in the designated waste area rendered ineffective the lower cost dozer operation planned and anticipated by Plaintiff. This change also prevented Plaintiff from being able to simultaneously "doze and push" into the waste area while "trucking and filling" the embankment extension.

20. The change in the designated waste area required virtually all of the material to be loaded into and hauled in trucks, an operation that was significantly more expensive than the planned dozer operation.

21. Plaintiff sent a letter to the State on April 14, 1986 putting the State on notice that the change in the designated waste area would increase its costs of performance.

22. The State's assertion that the waste area was not materially changed but rather "adjusted" or "enlarged" to accommodate more material is rejected. Placement of the waste filled slope, according to the plans, was not to have begun adjacent to the newly constructed embankment for the realigned highway.

23. The report and testimony of the State's experts that the waste area was not materially changed is rejected.

24. The testimony of Gaylord Gardner is most credible and accepted as the reasonable costs of the change in the waste area in the amount of \$507,300.

25. The plans specify that the slope of the sliver cut was to be at an angle of 1/2:1.

26. Plaintiff bid the project based upon the slope called out in the plans.

27. The State's project engineer requested of his supervisors that an addenda be issued before the bids were to be prepared indicating that the angle of the cut slope would be changed. For some unknown reason, no addenda was issued to formally notify the prospective bidders of said change. There were no amendments to the plans issued before the bid opening that modified the slope of the sliver cut from that shown on the contract documents.

28. The State staked the slope of the sliver cut at an angle of 1:1. The change to a 1:1 slope required Plaintiff to excavate more material, in the "sliver" cut area, required Plaintiff to go much higher up the existing cut, caused Plaintiff to encounter and

have to remove more layers of rock strata and caused Plaintiff to work in narrow areas much longer than anticipated.

29. Plaintiff was not directed by the State to change the sliver cut from what was indicated in the plans, before submitting its bid on the project.

30. The change in the slope of the sliver cut was a substantial modification of the original plans that worked to the remarkable disadvantage of Plaintiff.

31. The testimony of Gaylord Gardner is most credible and accepted as to the reasonable cost of the impacts of the change in the slope of the sliver cut in the amount of \$43,750.

32. The plans represented that there would be a 5% swell in the material between stations 855+50 and 862+50 and that there would be a 5% shrink in the material between stations 862+00 and 867+00. This information came from the State's materials Engineer working at the State's Materials Laboratory.

33. The representation in the plans as to the anticipated shrink and swell would cause a reasonable bidder to conclude that the material to be excavated was relatively soft, easily removable by ripping and would not require blasting with dynamite.

34. Plaintiff reasonably relied upon the shrink and swell factor set forth in the plans and did not anticipate having to perform blasting.

35. The State did not anticipate that any blasting would be required. The State had not performed any testing or coring of the area to be excavated. The only basis for projections of

anticipated conditions came from the prior contractor working in the area who was able to complete his work without blasting.

36. Plaintiff did not have any reasonable basis to conclude, even after making a pre-bid site inspection, that blasting was required.

37. The project actually ended up with an overall swell for the entire project of just under 15%. The evidence was conclusive that the change from an anticipated 5% swell on one portion of the project and a 5% shrink on another portion of the project to an actual swell of 15% for the entire project is a significant change.

38. The notations in the plans regarding shrink and swell are factors that reasonable bidders would use to determine the type, nature and characteristics of the soil to be encountered.

39. Plaintiff was unable to remove some of the rock by ripping with dozers even when they piggy backed two large dozers. This was due to the hardness of the strata and the fact that there were insufficient seams to allow the material to be ripped. Plaintiff was required to hire blasting subcontractors at significant expense to blast some of the rock material being encountered.

40. Plaintiff incurred expenses of \$116,000 in blasting rock.

41. Plaintiff did not include any money in its bid for blasting. Neither did two other bidders that testified at the trial.

42. The \$116,000 was a reasonable cost for the blasting that was performed but was not anticipated.

43. The representation in the plans as to the anticipated shrink and swell was incorrect. Since Plaintiff reasonably relied to its detriment on the representation, Plaintiff is entitled to the increased costs of \$116,000, which amount is reasonable for the blasting that was required.

44. The assertion by the State's experts that Plaintiff should have used heavier ripping equipment is rejected.

45. Plaintiff, on several occasions, requested that additional time be added to its contract.

46. The State, while acknowledging that additional time was due Plaintiff, never quantified the amount of time that should be granted until after Plaintiff had left the job. As a result, Plaintiff expedited its work in an attempt to meet the project's schedule.

47. The State assessed liquidated damages for a period of 56 days in order to hold money from Plaintiff and potential third-party creditors pending the outcome of the trial.

48. The State's project engineer acknowledged that Plaintiff was entitled to probably at least 60 additional days to perform the work because of the circumstances encountered.

49. No liquidated damages are assessed Plaintiff as it was entitled to have more days added to its contract than were used as the number of days of delay in assessing liquidated damages.

50. Plaintiff is entitled to the overtime paid by of Plaintiff of \$33,000 as a result of trying to timely complete the contract in the face of the unexpected and unknown changes.

51. Plaintiff is entitled to be paid the balance of the retention of \$21,428.

52. The contract between the parties was terminated by mutual agreement effective January 1, 1987 after Plaintiff had completed the greatest majority of the work when the bonding company securing the project was placed in receivership. Plaintiff was not in a position to obtain any replacement bonding company because of its devastated financial position because of the changes encountered in the performance of this project. The mutual termination was with a full reservation of rights as to both parties.

53. The centerline profile included in the plans for the project was incorrect. The centerline profile as shown was purported to be for a prior project. The State indicated that they intended on placing a note on the plans that the centerline profile was for a prior project. The State personnel failed to place such a note on the centerline profile shown in the project plans.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The State breached the contract between the parties by changing the location of the waste area without compensating Plaintiff for said change.

2. The State breached the contract between the parties by changing the angle of the slope of the sliver cut area without compensating Plaintiff for said change.

3. The State breached the contract between the parties by failing to pay Plaintiff for the reasonable costs of having to blast rock that was not anticipated based upon representations in the plans as to the anticipated shrink and swell factors to be encountered.

4. The State breached the contract between the parties by failing to pay Plaintiff for the overtime incurred by Plaintiff due to the unexpected and unknown changes.

5. The State breached the contract between the parties by failing to pay Plaintiff the balance of the retention of the contract balance of \$21,428.

6. The State breached the contract between the parties by failing to give Plaintiff a reasonable time extension to its contract due to the changes.

7. The State breached the contract between the parties by assessing liquidated damages against Plaintiff.

8. Plaintiff is entitled to damages incurred by reason of the foregoing breaches of contract in the following amounts: \$507,300 as a result of the change in the waste area; \$43,750 as a result of the change in the slope of the sliver cut; \$116,000 as a result of the unexpected cost of the blasting; \$33,000 as a result of the increased overtime; and \$21,428 for the balance of the retention due.

9. Plaintiff is entitled to interest on the foregoing sums at the statutory rate of 10% commencing January 1, 1987, the date of the mutual termination of the contract which date was after all the

work performed by Plaintiff was completed, until the date hereof.

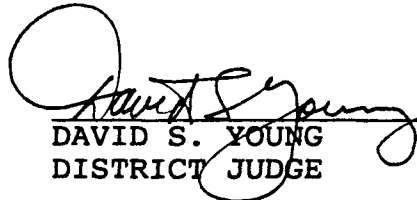
10. Plaintiff is not entitled to recover its costs incurred in this action.

11. The Counterclaim of the State is dismissed, no cause of action.

12. Plaintiff is entitled to have judgment entered against the State of Utah in the sum of \$721,478 together with prejudgment interest of \$372,763.63 through the month of February, 1992, with a per diem rate of \$197.67 thereafter until the date hereof. Interest on this judgment shall accrue at 12% per annum.

Dated this 6th day of MARCH, 1992.

BY THE COURT:


DAVID S. YOUNG
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 26 day of February, 1992, I caused a true and correct copy of the foregoing to be hand delivered to Leland D. Ford, Assistant Attorney General 4120 State Office Building, SLC, UT 84114.



Tab 7

MAR 06 1992

Robert F. Babcock #0158
Randy B. Birch #4197
WALSTAD & BABCOCK
Attorneys for Plaintiff
254 West 400 South, #200
Salt Lake City, Utah 84101
Telephone (801) 531-7000

SALT LAKE COUNTY
By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,

Plaintiff,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Defendant.

:
:
:
:
:
:
:
:
:

JUDGMENT

Civil No. 8805868

Judge David S. Young

2172569
3-10-92-808am.

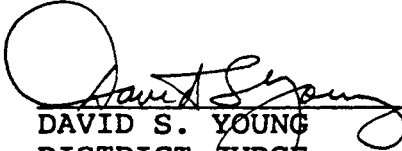
The subject case came on for trial before the Honorable David S. Young, sitting without a jury. The trial began on July 9, 1991 and continued through July 12, 1991. Closing arguments were presented July 16, 1991. Plaintiff was represented by Robert F. Babcock of and for Walstad & Babcock. Defendant was represented by Leland Ford. The Court, having previously made its Findings of Fact and Conclusions of Law, hereby orders:

1. Plaintiff is awarded judgment against the State of Utah in the sum of \$721,478 together with prejudgment interest at 10 per cent per annum, which through February 29, 1992, is \$372,763.63 (with a per diem rate of \$197.67 thereafter until the date hereof). Interest on this judgment shall accrue at 12% per annum.

2. The Counterclaim of the State is dismissed, no cause of action.

Dated this 6th day of MARCH, 1992.

BY THE COURT:


DAVID S. YOUNG
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 26 day of February, 1992, I caused a true and correct copy of the foregoing to be hand delivered to Leland D. Ford, Assistant Attorney General 4120 State Office Building, SLC, UT 84114.



4-misc fnlorder.306

Tab 8

FILED
DISTRICT COURT

MAR 31 2 57 PM '92

BY CP DISTRICT CLERK

PAUL VAN DAM
Attorney General
LELAND D. FORD (1100)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1017
Attorneys for Defendant


IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PROCON CORPORATION,	:	
	:	
Plaintiff,	:	NOTICE OF APPEAL
	:	
vs.	:	
	:	Civil No. 88-5868
UTAH DEPARTMENT OF TRANSPORTATION,	:	Judge David S. Young
	:	
Defendant.	:	

Notice is hereby given that Defendant and Appellant,
Utah Department of Transportation, by the Attorney General,
appeals to the Utah Supreme Court the final judgment of the
Honorable David S. Young entered in this matter on March 6, 1992.

DATED this 31st day of March, 1992.

PAUL VAN DAM
Attorney General


LELAND D. FORD
Assistant Attorney General
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the
Notice of Appeal was mailed, postage prepaid, this ____ day of
March, 1992, to the following:

ROBERT F. BABCOCK
RANDY B. BIRCH
WALSTAD & BABCOCK
254 West 400 South, #200
Salt Lake City, Utah 84101

Tab 9

1 BID AND BREAKS IT DOWN PER ITEM AND UNIT PRICE BASIS.

2 Q DID YOU--STRIKE THAT.

3 WAS THE BID SUBMITTED BY YOUR COMPANY, PROCON,
4 THE LOWEST BID THAT WAS SUBMITTED?

5 A NO.

6 Q HOW SOON AFTER YOU SUBMITTED BIDS, IF YOU RECALL,
7 WERE YOU CONTACTED ABOUT THE PROJECT?

8 A I BELIEVE IT WAS A COUPLE OF WEEKS. I DON'T
9 KNOW. I CAN'T REMEMBER FOR SURE BUT IT WAS A COUPLE OF
10 WEEKS AFTER.

11 Q WHAT WERE YOU TOLD WHEN YOU WERE APPROACHED?

12 A WE WERE CONTACTED BY SOMEBODY FROM U.D.O.T. THAT
13 SAID THAT THEY HAD REJECTED THE APPARENT LOW BIDDER'S BID
14 BECAUSE HE FAILED TO QUALIFY, OR HAVE HIS DBE OR HIS
15 DISADVANTAGE BUSINESS ENTERPRISE QUALIFICATION IN ORDER.
16 AND THEY OFFERED THE JOB TO US.

17 Q DID YOU SUBSEQUENTLY--WERE YOU SUBSEQUENTLY
18 AWARDED A CONTRACT?

19 A YES.

20 Q IS THAT CONTRACT AGAIN PART OF EXHIBIT 3?

21 A YES.

22 Q AND DOES THE CONTRACT INCORPORATE THE PLANS AND
23 THE SPECIFICATIONS?

24 A I BELIEVE SO. YES, IT DOES.

25 Q AFTER YOU WERE AWARDED THE CONTRACT WHAT KIND

1 OF EQUIPMENT DID YOU SEND TO THE JOB?

2 A THE FIRST PIECE OF EQUIPMENT WE SENT DOWN WAS
3 A DOZER, A KOMATSU D155A DOZER WHICH IS A LITTLE BIT LARGER
4 THAN A CAT, THE D8 CATERPILLAR DOZER.

5 Q AND WHAT OTHER EQUIPMENT DID YOU SEND?

6 A WE SENT DOWN A COMPACTOR THAT WE'D RENTED A
7 COMPACTOR FROM A SUPPLIER IN SALT LAKE AND SENT IT DOWN.
8 AND WE MOBILIZED A MOTOR PATROL WHICH IS A ROAD GRADER AND
9 OTHER THINGS. WE CONTINUED MOBILIZATION THE FIRST, YOU
10 KNOW, THE FIRST WEEK OR SO.

11 Q IN SHORT, DID YOU BASICALLY MOBILIZE THE KIND
12 OF EQUIPMENT THAT YOU TALKED ABOUT AS WHAT WAS CONTEMPLATED
13 IN THE BIDDING PROCESS?

14 A YES.

15 Q WAS YOUR COMPANY ABLE TO PERFORM THE WORK AS
16 IT WAS SHOWN IN THE PLANS?

17 A NO.

18 Q AS BEST YOU CAN RECALL, MAYBE YOU CAN TAKE SOME
19 OF THESE IN SEQUENCE, WHAT WAS THE FIRST THING YOU RECALL
20 CHANGING?

21 A THE FIRST THING THAT I WAS NOTIFIED WAS CHANGED
22 WAS APPROXIMATELY MARCH 20TH, THE STATE, THE WASTE AREA,
23 INSTEAD OF IN THIS AREA THEY MOVED AND STAKED IT SO THAT
24 IT CHANGED FROM THIS 865 AREA TO OUT TO APPROXIMATELY 871
25 OR 872. DOWN OUT IN THIS DEEPER HOLE.

1 Q NOW, YOU'VE BEEN POINTING AT EXHIBIT 15.
2 A YES. OR EAST. EXHIBIT 15. THEY STAKED IT EAST
3 OF THE RIGHT-OF-WAY--OR, I MEAN, THE DAYLIGHT SECTION, EXCUSE
4 ME. EAST OF THE DAYLIGHT SECTION INSTEAD OF SOUTH.
5 Q LET'S GO BACK TO EXHIBIT 6 AND GIVE YOU A YELLOW
6 PIECE OF PAPER. ASK IF YOU CAN PLACE THAT WHERE THE WASTE
7 AREA WAS ACTUALLY STAKED.
8 (WITNESS COMPLIES).
9 A APPROXIMATELY IN THAT AREA.
10 JUDGE YOUNG: SO THAT I'M CLEAR ON THAT, MR.
11 DIDERICKSEN, WOULD YOU IDENTIFY WHAT THE KNOLL WAS THAT
12 WAS SHOWN IN THE PICTURE THAT WAS TO BE REMOVED TO GRADE?
13 THE WITNESS: THE KNOLL IS RIGHT IN HERE.
14 (WITNESS INDICATING).
15 MR. BABCOCK: OR FROM THE PHOTOGRAPH MAYBE AGAIN.
16 (WITNESS INDICATING).
17 Q (BY MR. BABCOCK) SO BASED ON THIS PHOTOGRAPH,
18 INSTEAD OF STAKING IT BEHIND THE KNOLL AT THE SOUTH IT WAS
19 STAKED OFF THE END OF IT TO THE EAST.
20 A THAT'S CORRECT.
21 Q DID YOUR COMPANY PROCEED THEN TO PLACE THE EXCESS
22 MATERIAL IN THE AREA WHERE IT WAS STAKED?
23 A YES.
24 Q DID YOUR COMPANY SEND A LETTER EXPRESSING A
25 CONCERN TO U.D.O.T. ABOUT THAT CHANGE?

1 US INTO THIS THICK LEDGES AND CAUSED ADDITIONAL BLASTING.
2 AND WE NOTED THAT THE FURTHER INTO THE HILL THAT
3 THIS SLOPE PUSHED US INTO THE HARDER THE MATERIAL WAS.
4 IT WASN'T EXPOSED TO WEATHERING. AND SO THE MATERIAL THAT
5 COULD BE RIPPED OR EXCAVATED ON THE LOWER PORTION AS YOU
6 EXTEND IT INTO THE HILL, IT BECAME VERY HARD WITH NO SEAMS
7 IN IT. WHEN YOU LOOK AT RIPABLE MATERIAL YOU CAN LOOK AT
8 MATERIAL AND SAY THEY CAN BE RIPPED IF IT HAS SEAMS AND
9 IS WEATHERED. IF YOU LOOK AT SOLID MATERIAL THAT REQUIRES
10 BLASTING, AND MOST OF IT HAS NO SEAMS AND IS UNRIPABLE,
11 THAT IS THE TYPE OF MATERIAL THAT WE ENCOUNTERED AS WE WENT
12 INTO THE HILL.

13 Q DID YOU THEREAFTER DO BLASTING?
14 A YES.

15 Q DID YOU DO THAT WITH YOUR OWN FORCES OR WAS THAT
16 HIRED THROUGH A SUBCONTRACTOR?

17 A WE STARTED OUT WITH A SUBCONTRACTOR AND THEN
18 AS WE CAME DOWN THE HILL AND HIT NO-RIPABLE MATERIAL IN
19 THE LOWER SECTIONS WE DID IT OURSELVES. WE BLASTED. WE
20 RENTED EQUIPMENT AND DID IT OURSELVES.

21 Q SO YOU RENTED THE EQUIPMENT. WHEN YOU SAY "YOU
22 DID IT YOURSELVES," WERE THEY ACTUALLY LONG TIME EMPLOYEES
23 OF PROCON?

24 A THEY WERE FAIRLY LONG TIME EMPLOYEES. IN THE
25 BEGINNING OF THE--AS LONG AS PROCON HAD BEEN IN EXISTENCE.

1 AT THE BEGINNING OF THE JOB WE HIRED SOME BLASTING
2 SPECIALISTS FROM BEECO AND WE PUT THOSE MEN ON OUR PAYROLL
3 SO THAT WE DIDN'T HAVE TO WRITE A SUBCONTRACT AND GO THROUGH
4 THE APPROVAL PROCESS OF U.D.O.T. AND THAT WAS WITH THE
5 SUGGESTION OF HUGH KIRKHAM SO WE COULD EXPEDITE THE BLASTING
6 PROCESS. WE RENTED THEIR EQUIPMENT AND USED THEIR MEN ON
7 OUR PAYROLL.

8 Q HOW MUCH DID YOU SPEND BLASTING ROCK IN THAT
9 AREA ON THE JOB?

10 A OVER \$100,000.00.

11 Q CAN YOU GIVE US--

12 A APPROXIMATELY 116,000 ACCORDING TO OUR RECORDS.

13 Q THAT WAS SIMPLY ON BLASTING COSTS?

14 A THAT WAS SIMPLY BLASTING COSTS.

15 Q NOW, DID THE BLASTING ONLY OCCUR IN THE CUT FACE?

16 A NO, IT ALSO--WE INCURRED SOME BLASTING IN THE
17 SHRINK AREA, THE AREA THAT WAS DESIGNATED AS A SHRINK OR
18 DAYLIGHT AREA, AND BACK JUST BEHIND THE DAYLIGHT AREA IN
19 THE 862 AND 863 AREA.

20 Q SO YOU ACTUALLY DID SOME BLASTING AS WELL IN
21 THE AREA THAT WAS SUPPOSED TO SHRINK, THE DAYLIGHT AREA.

22 A THAT'S CORRECT.

23 Q DO YOU HAVE AN OPINION AS TO WHETHER OR NOT THAT
24 MATERIAL WAS RIPABLE WITH DOZERS?

25 A NO. THE MATERIAL THAT WE HAD TO SHOOT THERE

1 WAS NOT RIPABLE AT ALL. YOU COULD ADD A D10 UP THERE AND
2 YOU COULDN'T RIP IT. YOU CAN'T RIP IT SOLID MATERIAL WITH
3 NO SEAMS.

4 Q WELL, COULD YOU GET A D10 UP THAT SLOPE?

5 A I WOULDN'T WANT TO DRIVE IT. I DON'T THINK YOU
6 COULD. IT'S TOO WIDE AND IT'S DANGEROUS. OR SAFETY WISE,
7 YOU COULDN'T GET IT UP THERE.

8 Q WAS IT RIPABLE WITH THE D9, IN YOUR OPINION?

9 A D9, NO.

10 Q AND RIPABLE WITH A D8?

11 A NO.

12 Q HOW DID THE BLASTED MATERIAL, AFTER IT WAS SHOT,
13 HOW DID THAT AFFECT THE TRANSPORT, THE HAULING AND THE PLACE-
14 MENT OF THE EARTH? WERE THERE IMPACTS ABOVE AND BEYOND
15 JUST HAVING BLASTED MATERIAL?

16 A YES. AS I EXPLAINED BEFORE, AS YOU BLAST THE
17 MATERIAL IT EXPANDS, IT GETS BIG CHUNKS AND EXPANDS IT,
18 SO THE EFFICIENCY OF YOUR--THE LOADABILITY EFFICIENCY OF
19 YOUR EQUIPMENT GOES WAY DOWN, PLUS THE SIZE OF THE MATERIAL
20 THAT YOU'RE LOADING IS SO BIG THAT YOUR BACKHOE THEN BECOMES
21 WHAT YOU CALL A NON-EFFICIENT MATERIAL THAT COULDN'T PICK
22 IT UP.

23 SO WE ENDED UP BRINGING ANOTHER TYPE OF MACHINE
24 DOWN WHICH WAS A RUBBER TIRED LOADER. AND IN SOME ASPECTS
25 AND IN SOME CASES THE LOADER, WHICH HAS A SEVEN AND A HALF

1 CUBIC YARD BUCKET CAPACITY LOADER, CAN ONLY PICK UP ONE
2 BOULDER AND HAD TO TRAM IT IN. TRAM WOULD CARRY IT DOWN
3 THE AREA AND DUMP IT OVER THE SIDE. SO THE MATERIAL
4 INCREASED IN SIZE.

5 HUGH KIRKHAM, IN SOME OF THE NOTES I HAVE NOTED,
6 THAT THEY COULD NOT TEST THE MATERIALS SO THEY COULDN'T
7 RUN THE COMPACTION AND ASK US TO WHEEL ROLL IT WITH THE
8 LOADED TRUCKS BECAUSE THE MATERIAL WAS SO LARGE. SO THE
9 EFFICIENCY FACTOR ON THE HAULING EQUIPMENT WENT DOWN, THE
10 EFFICIENCY FACTOR ON OUR DOZING EQUIPMENT AND LOADING EQUIP-
11 MENT. WE HAD TO CHANGE METHODOLOGY FROM A BACKHOE TO A
12 LOADER WHICH COST US MORE MONEY AND LOWERED OUR EFFICIENCY
13 QUITE A BIT. PLUS THE COMPACTION, IT IMPACTED THE COMPACTION
14 SUBSTANTIALLY TOO. YOU HAVE A COMPACTOR THAT SOME OF THE
15 BOULDERS WERE BIGGER THAN THE COMPACTOR.

16 Q NOW, DID YOU HAVE OCCASION TO HAVE ANY DISCUSSIONS
17 WITH MR. KIRKHAM DURING THE PERFORMANCE OF THE JOB ABOUT
18 THE BLASTING THAT WAS BEING UNDERTAKEN?

19 A YES. WE TOLD HIM--OR I TALKED TO HIM AND INFORMED
20 HIM THAT WE WERE GOING TO HAVE TO BLAST. SENT HIM A LETTER
21 THAT I THEN FOLLOWED IT UP WITH ANOTHER LETTER TELLING HIM
22 WE ENCOUNTERED UNFORESEEN CHANGES AND WE HAD FILED A CLAIM
23 FOR UNFORESEEN CONDITIONS.

24 Q LET ME SHOW YOU SOME LETTERS MARKED EXHIBIT 19,
25 20 AND 21. AND DO YOU RECOGNIZE THOSE LETTERS?

1 A YES, I DO.

2 Q WERE THOSE LETTERS SENT BY PROCON TO U.D.O.T.?

3 A YES, THEY WERE.

4 Q DO THOSE LETTERS MAKE ANY REFERENCE TO THE
5 BLASTING ISSUE WE'VE JUST BEEN TALKING ABOUT?

6 A YES.

7 MR. FORD: WHAT WERE THE DATE OF THOSE?

8 JUDGE YOUNG: THE DATE OF THE EXHIBIT 19-P IS
9 MAY 28, 1986; 20-P IS JUNE 20, 1986; AND 21-P IS JUNE 23RD,
10 1986.

11 DO YOU OFFER EACH?

12 MR. BABCOCK: YES.

13 JUDGE YOUNG: ANY OBJECTION?

14 MR. FORD: NO OBJECTION, YOUR HONOR.

15 JUDGE YOUNG: THEY ARE RECEIVED.

16 (WHEREUPON, PLAINTIFF'S EXHIBITS
17 19, 20, AND 21 WERE OFFERED AND
18 RECEIVED INTO EVIDENCE).

19 JUDGE YOUNG: WHILE WE'RE AT IT LET'S CLEAR UP
20 THE OTHER EXHIBITS THAT YOU WISH TO OFFER SO THAT THEY MAY
21 ALSO BE RECEIVED OR RULED UPON.

22 MR. BABCOCK: WE HAD MOVED FOR THE ADMISSION
23 OF EXHIBIT 16, THE BID NOTES; 17, WHICH IS THE BID TAB OR
24 ABSTRACT OF BIDS; AND EXHIBIT 18, WHICH IS THE APRIL 14TH
25 LETTER.

1 MR. FORD: I HAVE NO OBJECTION TO 16 OR 17 BUT
2 I WOULD LIKE TO VOIR DIRE THE WITNESS ON 18.

3 JUDGE YOUNG: ALL RIGHT. 16 AND 17 ARE RECEIVED.
4 (WHEREUPON, PLAINTIFF'S EXHIBITS
5 16 AND 17 WERE OFFERED AND
6 RECEIVED INTO EVIDENCE).

7 JUDGE YOUNG: 18, YOU MAY VOIR DIRE ON THE LETTER
8 OF APRIL 14TH, '86.

9
10 VOIR DIRE EXAMINATION

11 BY MR. FORD:

12 Q WOULD YOU REFER TO EXHIBIT 18, PLEASE? DID YOU,
13 IN FACT, SEND THAT LETTER, MR. DIDERICKSEN?

14 A I DIDN'T, NO.

15 Q DO YOU KNOW WHO IN YOUR COMPANY WOULD HAVE SENT
16 THAT LETTER?

17 A I WOULD ASSUME IT WOULD HAVE BEEN MR. FILLMORE
18 OR MY WIFE OR SOMEBODY. I JUST HAVE A COPY OF THAT AND
19 REVIEWED IT WITH HIM AND ASSUMED THAT IT WAS MAILED OUT.
20 I DIDN'T ACTUALLY MAIL IT MYSELF.

21 Q DID YOU HAVE ANY CONVERSATIONS WITH MR. KIRKHAM
22 RELATIVE TO THAT LETTER?

23 A I DIDN'T PERSONALLY, NO. I ASSUMED MISTER--
24 OR LARRY DID. MR. FILLMORE DID. I DID NOT TALK TO MR.
25 KIRKHAM.

1 MR. FORD: WELL, I'LL REPRESENT TO YOU THERE
2 IS NO COPY OF THAT LETTER IN U.D.O.T.'S FILES AND FOR THAT
3 REASON I HAVE A CONCERN ABOUT IT, YOUR HONOR. THE FIRST
4 TIME THAT THE ENGINEER SAW THAT LETTER WAS WHEN I SHOWED
5 IT TO HIM A YEAR AGO IN RESPONSE TO SOME INTERROGATORIES.
6 WE'D OBJECT TO IT.

7 JUDGE YOUNG: WELL, THE OBJECTION IS SUSTAINED
8 AS TO FOUNDATION AT THIS TIME.

9 MR. BABCOCK: WELL, SOME MORE QUESTIONS.

10 JUDGE YOUNG: WELL, THIS WITNESS WOULDN'T BE
11 QUALIFIED TO TESTIFY TO THE FOUNDATION OF THAT LETTER AS
12 TO WHETHER IT WAS SENT. SO THE OBJECTION IS SUSTAINED WITH-
13 OUT PREJUDICE FOR YOUR OPPORTUNITY TO LAY AN ADEQUATE
14 FOUNDATION.

15 MR. BABCOCK: I WAS GOING TO DO SOME OF THAT.
16 I'LL FILL IN SOME OF THAT HERE AND MORE WITH MR. FILLMORE
17 LATER, I TRUST.

18

19 DIRECT EXAMINATION (CONTINUED)

20 BY MR. BABCOCK:

21 Q WAS A COPY OF THAT LETTER MAINTAINED IN YOUR
22 FILES?

23 A YES.

24 Q IN FACT, I'M HANDING YOU A NOTEBOOK. CAN YOU
25 IDENTIFY WHAT THIS NOTEBOOK IS THAT I'VE HANDED YOU?

1 A THIS NOTEBOOK IS ESSENTIALLY WHAT I CALL A JOB
2 NOTEBOOK WHICH I KEPT CURRENT INFORMATION FROM THE PROJECT
3 SUCH AS WHAT EQUIPMENT WE WERE GOING TO USE AND THE SPECI-
4 FICATIONS AND HOW I BID THE JOB AND ALL OF THE INFORMATION
5 I NEEDED TO--THAT WAS JOB SPECIFIC.

6 Q DOES IT HAVE A DIVIDER IN IT CALLED WRITTEN
7 COMMUNICATION?

8 A THAT'S CORRECT, IT DOES.

9 Q CAN YOU LOOK AT THAT AND IS THAT LETTER FOUND
10 IN YOUR ORIGINAL JOB RECORDS?

11 A YES.

12 Q WOULD YOU HAVE PLACED IT THERE IN THE ORDINARY
13 COURSE OF RECEIVING DOCUMENTS AND CORRESPONDENCE RELATIVE
14 TO THIS PROJECT?

15 A YES.

16 Q DO YOU KNOW WHO WOULD HAVE--I NOTE THAT THE
17 STAMP, FILE COPY, THAT SHOWS UP BACK ON THE PHOTOCOPY IS
18 IN RED. DO YOU KNOW WHO WOULD STAMP THAT ON?

19 A IT WOULD BE EITHER MYSELF OR MY WIFE.

20 Q IS THAT A PRACTICE THAT YOU FOLLOWED, LOOKING
21 THROUGH THE COMMUNICATION LETTERS OR--

22 A YES, AS MUCH AS I COULD. I MIGHT HAVE MISSED
23 ONE OR TWO BUT NORMALLY I DID, YES. AND WHICH SHOWED THAT
24 IT WAS, THAT I PLACED IT IN THE FILE AND THAT IT WAS A FILE
25 COPY.

1 Q AND THIS IS THE PRACTICE YOU USED IN KEEPING
2 CURRENT CORRESPONDENCE RELATIVE TO THIS PROJECT?

3 A YES.

4 Q DO YOU HAVE ANY REASON TO BELIEVE IT WAS NOT SENT?

5 A NO.

6 MR. BABCOCK: ALL RIGHT. BASED ON THAT I'D ONCE
7 AGAIN MOVE FOR THE ADMISSION OF THE DOCUMENT AS ONE KEPT
8 IN THE ORDINARY COURSE IN THE ORIGINAL FILES OF THE PROCON
9 REPRESENTATIVE TO THIS PROJECT.

10 MR. FORD: YOUR HONOR, MAYBE I COULD INQUIRE.
11 DO YOU INTEND TO CALL MR. FILLMORE?

12 MR. BABCOCK: WE HOPE TO. HE'S IN CALIFORNIA,
13 WORKING IN CALIFORNIA, AND WE TALKED TO HIM YESTERDAY.
14 AND THEY'RE BIDDING A JOB TODAY AND HE ANTICIPATES HE CAN
15 CATCH A FLIGHT, GET APPROVAL OF HIS EMPLOYER TO BE HERE.
16 BUT WE HAD A SUBPOENA OUT BUT HE DIDN'T COME BACK FROM
17 CALIFORNIA WHEN WE THOUGHT WE COULD HAVE HIM SUBPOENAED.
18 SO WE'RE INTENDING TO BUT WE'RE NOT SURE IF WE CAN, IN FACT,
19 GET HIM HERE.

20 MR. FORD: SINCE HE IS THE AUTHOR OF THE LETTER
21 HERE, YOUR HONOR, I REALLY DO HAVE SOME CONCERN ABOUT IT
22 BECAUSE IN HIS DEPOSITION, I'LL REPRESENT TO YOU--WE CAN
23 USE HIS DEPOSITION IF NECESSARY--HE DID NOT RECALL THE
24 LETTER, HE DID NOT RECALL A TELEPHONE CONVERSATION REFERRED
25 TO IN THE LETTER. SO IT'S A MATTER OF CONSIDERABLE CONCERN

1 TO US.

2 MR. BABCOCK: IN THE BROAD SETTING OF THE DEPO-
3 SITION YOU'LL RECALL HE STARTED OUT BY SAYING HE HADN'T
4 REVIEWED ANY NOTES OR ANYTHING PRIOR TO TAKING HIS DEPOSI-
5 TION AND SAID HE WAS FLYING BLIND.

6 MR. FORD: I UNDERSTAND.

7 MR. BABCOCK: JUST SO YOU GET THE PROPER SETTING.
8 IT'S NOT THAT HE WAS RECALLING A WHOLE LOT AT THE TIME OF
9 HIS DEPOSITION BECAUSE OF THE BEING CALLED ON THE COLD THAT
10 WAY.

11 JUDGE YOUNG: WELL, I HAVE SOME CONCERNS ABOUT
12 THE LETTER, AND THE OBJECTION THAT MR. FORD HAS MADE WOULD
13 BE SUSTAINED AT THIS TIME WITHOUT PREJUDICE FOR YOU TO RENEW
14 IT. AND I'M NOT RULING. I'M TAKING UNDER ADVISEMENT WHETHER
15 THERE'S AN ADEQUATE FOUNDATION LAID AS TO THE ISSUE OF THE
16 NORMAL COURSE OF THE RECORDS BEING AN ADEQUATE BASIS FOR
17 ADMISSION OF THE EXHIBIT. SO I'M NOT RENDERING A DECISION
18 ON THAT AT THIS TIME.

19 MR. BABCOCK: THANK YOU, YOUR HONOR.

20 Q (BY MR. BABCOCK) DIRECTING YOUR ATTENTION BACK
21 TO THE EXHIBIT, THE LAST ONE, EXHIBIT 21. DID YOU AUTHOR
22 THAT LETTER?

23 JUDGE YOUNG: THAT'S BEEN RECEIVED.

24 MR. BABCOCK: I UNDERSTAND THAT.

25 JUDGE YOUNG: DID YOU SAY DID YOU AUTHOR?

1 MR. BABCOCK: YES.

2 JUDGE YOUNG: I SEE.

3 A (BY THE WITNESS) YES.

4 Q (BY MR. BABCOCK) WHAT PROMPTED YOU TO SEND THAT

5 LETTER?

6 A I MET WITH MR. KIRKHAM IN NORTH SALT LAKE,

7 MY WIFE AND I. AND WE REVIEWED SOME OF THE PROBLEMS THAT

8 WE WERE HAVING. AND HE ADVISED US, OR ADVISED US THAT WE

9 SHOULD ASK FOR AN EXTENSION. AND HE REVIEWED THESE AREAS

10 WITH US AND BASICALLY ADVISED US WHAT TO PUT IN THE EXTENSION

11 LETTER.

12 Q WE TALK ABOUT EXTENSION. WHAT IS IT THAT YOU

13 WERE CONCERNED ABOUT HAVING EXTENDED?

14 A THE TIME OF COMPLETION.

15 Q AND HOW WAS THE CONTRACT TIME BEING IMPACTED?

16 A BECAUSE THE CHANGES IN THE PLANS--IT DROPPED

17 OUR ANTICIPATED PRODUCTION PER DAY DOWN AND THE COSTS WERE

18 GOING UP AND IT IMPACTED--IT WAS GOING TO TAKE US LONGER

19 TIME BECAUSE IT WAS A SLOWER PROCESS, AND THE MATERIAL HAD

20 CHANGED, SO WE COULD SEE THAT WE WERE NOT GOING TO GET THE

21 PRODUCTION, PLUS THE FACT THAT AS THE LETTER STATED, BECAUSE

22 YOU CAN SEE ON EXHIBIT 15-P, ALL OF THESE COVES RIGHT HERE,

23 NOW WHEN WE BUILT THE ACCESS ROAD, THESE WERE OUT OF THE

24 ORIGINAL WASTE AREA AND SO BUILDING THE ACCESS ROAD WE

25 FILLED THOSE IN AND NOW WITH THE NEW AREA OF NEW WASTE AREA

Tab 10

1 VALERIE DIDERICKSEN,
2 CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF,
3 HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED
4 AS FOLLOWS:

5
6 THE CLERK: PLEASE BE SEATED AND STATE YOUR NAME
7 AND SPELL IT.

8
9 THE WITNESS: VALERIE L. DIDERICKSEN,
10 V-A-L-E-R-I-E, L FOR LOWELL, AND DIDERICKSEN, D-I-D-E-R-
11 I-C-K-S-E-N.

12
13 DIRECT EXAMINATION

14 BY MR. BABCOCK:

15 Q WHAT IS YOUR RELATIONSHIP TO JIM DIDERICKSEN?

16 A I'M HIS WIFE.

17 Q AND HAVE YOU HAD A RELATIONSHIP WITH PROCON COR-
18 PORATION?

19 A YES, I WAS THE VICE PRESIDENT AND SECRETARY.

20 Q AND DID YOU HAVE OCCASION TO HAVE ANY MEETINGS
21 WITH MR. KIRKHAM, THE PROJECT ENGINEER?

22 A YES, WE DID. WE MET HIM IN THE NORTH SALT LAKE
23 OFFICE THAT WE HAD.

24 Q DO YOU RECALL APPROXIMATELY WHEN IT WAS?

25 A WHEN IT WAS?

1 Q THAT YOU MET HIM.

2 A I THINK IT WAS AROUND THE END OF MAY, FIRST PART
3 OF JUNE. HE CAME UP FOR A MEETING WITH THE STATE PEOPLE
4 AND THEN HE CAME OVER TO OUR OFFICE AND MET WITH JIM AND I.

5 Q DO YOU RECALL WHAT WAS DISCUSSED AT THAT MEETING?

6 A YEAH, HE TALKED ABOUT SEVERAL THINGS. HE--WE
7 THOUGHT HE WAS REALLY A NICE GUY. HE TOLD US THAT HE THOUGHT
8 WE WERE DOING A GOOD JOB. HE TOLD US HE WAS IMPRESSED WITH
9 THE WAY BILL HAD DONE THE SLIVER CUT. HE GOT A BACKHOE
10 UP THERE AND WAS TAKING THE MOUNTAIN DOWN WITH THE BUCKET
11 OF THE BACKHOE. AND HE TOLD US HE THOUGHT THAT WAS GOOD
12 THE WAY HE WAS DOING THAT.

13 WE TOLD HIM WE WERE REALLY CONCERNED ABOUT THE
14 TIME, WE WERE AFRAID THAT IT WAS GOING TO TAKE MORE TIME
15 THAN THE 90 DAYS THAT THE JOB SPECIFIED IN THE BEGINNING
16 SO HE TOLD US THAT HE WOULD TELL US SOME THINGS THAT WE
17 COULD DO. AND WE COULD WRITE A LETTER AND TRY TO GET AN
18 EXTENSION FOR THE TIME. HE THOUGHT HE COULDN'T SEE ANY
19 PROBLEM WITH IT. HE SAYS 90 DAYS WAS KIND OF LIKE AN AVERAGE
20 TIME AND SO HE THOUGHT THAT HE COULD GET US SOME MORE DAYS
21 BUT IT WAS UP TO THE FEDERAL PEOPLE. SO HE TOLD US TO WRITE
22 A LETTER AND EXPLAIN TO THEM WE WERE HAVING TO BLAST, AND
23 HOW LONG IT TOOK FOR US TO FIND--

24 JUDGE YOUNG: JUST A MOMENT. THIS IS A NARRA-
25 TIVE RESPONSE BEYOND THE SCOPE OF THE QUESTION. IF YOU

1 WILL ASK YOUR NEXT QUESTION, PLEASE. JUST RESPOND TO THE
2 QUESTIONS, PLEASE.

3 THE WITNESS: OKAY.

4 Q (BY MR. BABCOCK) DID HE TELL YOU ANYTHING ABOUT
5 WHETHER OR NOT HE THOUGHT YOU WERE ENTITLED TO MORE TIME?

6 A YES, HE SAID THAT IT TOOK US A LONG TIME TO FIND
7 SOMEONE TO BLAST DOWN THERE, WHICH IT DID. WE CALLED ALL
8 OVER BECAUSE IT'S SUCH A REMOTE AREA IT WAS HARD TO FIND
9 SOMEBODY TO GO DOWN THERE. HE SAID THAT WAS ONE FACTOR.

10 HE ALSO TALKED ABOUT THE COVES AND SAID WE HADN'T
11 ANTICIPATED HAVING TO COMPACT IN THOSE COVE AREAS. HE SAID
12 THAT THAT WAS ANOTHER THING THAT WE COULD PUT IN OUR LETTER
13 TO ASK FOR AN EXTENSION OF TIME.

14 Q DO YOU RECALL ANYTHING ELSE HE MENTIONED THAT
15 YOU COULD PUT IN THE LETTER TO GET MORE TIME?

16 A NO, I DON'T RECALL RIGHT NOW.

17 Q MAKE ANY COMMENT ABOUT THE DJB TRUCKS OR THE
18 ARTICULATED HAULING TRUCKS?

19 A YEAH, WE TALKED ABOUT THAT AND HE SAID THAT HE
20 WAS IMPRESSED WITH THEM TOO. HE EVEN MENTIONED IN THAT
21 MEETING THAT HE DIDN'T KNOW HOW A SCRAPER COULD GET UP THAT
22 STEEP GRADE BECAUSE THE GRADE WAS SO STEEP. AND SO HE SAID
23 THAT THE DJB'S WERE DOING A GOOD JOB IF THEY JUST WEREN'T
24 BREAKING DOWN.

25 Q DID HE MAKE ANY COMMENT ABOUT WHY HE HADN'T

1 RESPONDED TO SOME OF THE PRIOR REQUESTS AND LETTERS?

2 A HE TOLD US IT WOULD BE BETTER IF HE DIDN'T GO
3 ON RECORD, THAT HE COULD HELP US MORE IF THERE WASN'T A
4 RECORD, AND SO HE WOULD DO EVERYTHING HE COULD BUT IT WAS
5 BETTER FOR HIM NOT TO RESPOND TO US IN WRITING.

6 Q WERE YOU AWARE OF ANYTHING THAT HE'S DONE TO
7 HELP OUT? HAS THERE BEEN ANY KIND OF FAVORABLE RESPONSE
8 ON ANY OF THE CLAIMS?

9 A NO, I'M NOT.

10 Q DO YOU RECALL ANYTHING ELSE THAT HE SAID AT THAT
11 MEETING?

12 A NO, I DON'T RECALL ANYTHING ELSE.

13 Q DO YOU RECALL ANY OTHER CONVERSATIONS WITH MR.
14 KIRKHAM?

15 A I HAD SOME JUST GENERAL CONVERSATIONS WHEN THERE
16 WAS A PROBLEM WITH THE PAYROLL AND I WOULD CALL HIM AND
17 TALK TO HIM ABOUT THAT. BUT THE CONVERSATIONS THAT I REMEM-
18 BER, IT WAS AFTER WE HAD LEFT THE JOB AND THE STATE WAS
19 DOWN THERE FINISHING IT AND I, FOR SOME REASON, I CAN'T
20 REMEMBER NOW WHY I CALLED HIM, BUT HE WAS TALKING ABOUT
21 THAT THEY HAD HAD TO PUT ANOTHER DRAIN LINE IN AND THEY
22 HAD HAD TO DRILL HOLES AND SHOOT IT DOWN THERE. AND HE
23 WAS LAUGHING BECAUSE THEY HAD DRILLED THE HOLES AND FILLED
24 IT WITH THE POWDER AND SHOT IT AND IT DIDN'T EVEN BUDGE.
25 AND JOKINGLY I SAID TO HIM, YEAH, YOU SHOULD HAVE LEARNED

1 FROM WHAT WE DID BECAUSE WHEN BEECO WENT DOWN THERE THAT'S
2 WHAT HAPPENED WITH THEM. THEY DRILLED THE HOLE AND FILLED
3 'EM FULL OF POWDER AND SHOT IT AND NOTHING HAPPENED AND
4 THEY HAD TO REALLY PUT LOTS OF POWDER IN THERE. SO I WAS
5 TELLING HIM THAT THEY PROABLY SHOULD HAVE LEARNED FROM WHAT
6 WE WENT THROUGH.

7 Q DO YOU RECALL ANY OTHER DISCUSSION WITH HIM
8 EARLIER IN THE PROJECT ABOUT WHETHER OR NOT THERE WERE
9 CHANGES IN THE JOB?

10 A OH, YES. BILL HAD CALLED ME ON THE PHONE, BILL
11 THOMAS, OUR PROJECT SUPERINTENDENT, AND SAID THE CENTERLINE'S
12 DIFFERENT. AND HE SAYS, YOU KNOW, HE SAYS I'VE TOLD 'EM,
13 I'VE TALKED TO FERD AND I TALKED TO HUGH KIRKHAM AND I
14 CAN'T GET ANYWHERE. WOULD YOU PLEASE CALL DOWN THERE AND
15 TELL 'EM THAT IT'S OUR CONTENTION IT'S IN A DIFFERENT PLACE.
16 AND IT'S BEEN CHANGED. AND SO I CALLED HUGH ON THE PHONE
17 AND ASKED HIM AND HE SAYS NO, THERE HAVE BEEN NO CHANGES,
18 THAT THE CENTERLINE IS EXACTLY THE WAY IT SHOWS ON THE PLANS.

19 Q LET ME SHOW YOU WHAT'S PREVIOUSLY BEEN MARKED
20 AS EXHIBIT 26, I BELIEVE. FIRST OF ALL, ARE YOU FAMILIAR
21 WITH THE BOOKS AND RECORDS OF PROCON CORPORATION?

22 A YES, I AM.

23 Q DID YOU HAVE ANY RESPONSIBILITIES RESPECTIVE
24 TO PAYING BILLS?

25 A I PAID ALL THE BILLS. I DID THE PAYROLL, SIGNED

1 THE CERTIFIED PAYROLLS.

2 Q ARE YOU AWARE AS TO WHETHER OR NOT PROCON MADE
3 MONEY ON THIS JOB?

4 A ABSOLUTELY NOT. WE LOST A SUBSTANTIAL AMOUNT
5 OF MONEY.

6 Q DO YOU KNOW IF THAT DOCUMENT ACCURATELY REFLECTS
7 THE KIND OF EXPENSES THAT WERE INCURRED BY PROCON ON THAT
8 JOB?

9 A YES, IT DOES. IF WE WERE TO PAY EVERYBODY EVERY-
10 THING THAT THEY WOULD NEED TO BE PAID IN ORDER TO BE PAID
11 UP TO DATE IT DOES.

12 MR. BABCOCK: I THINK THAT'S ALL THE QUESTIONS
13 I HAVE.

14 JUDGE YOUNG: CROSS-EXAMINATION?

15 MR. FORD: I HAVE NO QUESTIONS, YOUR HONOR.

16 JUDGE YOUNG: THANK YOU, YOU MAY STEP DOWN.

17 WHO IS YOUR NEXT WITNESS AND HOW LONG DO YOU
18 ANTICIPATE?

19 MR. BABCOCK: IF I COULD MAYBE CALL, I ANTICIPATED
20 CALLING--WE CAN GET THE FOUNDATION OF SOME OF THESE PHOTO-
21 GRAPHS.

22 JUDGE YOUNG: IS THAT ALL YOU WOULD ANTICIPATE
23 FROM THAT WITNESS?

24 MR. BABCOCK: NO.

25 JUDGE YOUNG: LET'S TAKE OUR EVENING RECESS THEN

1 AT THIS TIME. IF YOU HAVE LONGER WITNESSES LET'S DEAL WITH
2 THAT TOMORROW.

3 MR. BABCOCK: I THOUGHT MAYBE I'D WRAP UP A LOOSE
4 END.

5 JUDGE YOUNG: WE WILL START AT 9:00 O'CLOCK
6 TOMORROW MORNING. WE WILL BE IN RECESS UNTIL THEN.

7 MR. FORD: YOUR HONOR, BEFORE YOU RECESS, I DON'T
8 THINK I MOVED TO ADMIT THOSE PHOTOGRAPHS. IF I HAVEN'T,
9 I WOULD LIKE TO DO SO.

10 MR. BABCOCK: WE HAVE NO OBJECTION.

11 JUDGE YOUNG: ALL RIGHT. THEY ARE EXHIBITS 28
12 THROUGH 33. THEY ARE EACH RECEIVED WITHOUT OBJECTION.
13 THANK YOU.

14 (WHEREUPON, DEFENDANT'S EXHIBITS
15 28 THROUGH 33 WERE OFFERED AND
16 RECEIVED INTO EVIDENCE).

17 (RECESS).

18 * * *

19

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Tab 11

1 PAVING HAS THE PROJECT IN NORTH SALT LAKE I THINK BY THE
2 LAKE, UTAH POWER HAS PROBLEM WITH THE FLOOD AND THEY RE-
3 BUILDING THE DIKE. THE DJB'S WORK FOR US THERE.

4 Q SO YOU WERE SOMEWHAT FAMILIAR WITH THE DJB?

5 A YES.

6 Q DID YOU HAVE ANY REASON TO BELIEVE THAT THE DJB'S
7 WOULDN'T BE A REASONABLE APPROACH ON THE PROJECT AT CLAY
8 HILLS PASS?

9 A NO. I THINK THEY COULD HAVE GOT THE JOB DONE
10 WITH THE DJB'S. I DON'T SEE ANY PROBLEM WITH IT. IT ALL
11 DEPENDS ON HOW YOU LOOK AT IT AS AN ESTIMATOR.

12 Q I INFER FROM THAT THAT THERE ARE VARIOUS WAYS
13 TO LOOK AT A JOB, THAT'S WHY THERE'S VARIOUS ESTIMATOR--

14 A THAT'S RIGHT. THAT'S WHY YOU GOT VARIOUS UNIT
15 PRICES.

16 MR. BABCOCK: I THINK THAT'S ALL I HAVE. IF
17 I COULD HAVE A MOMENT?

18 JUDGE YOUNG: CROSS-EXAMINATION?

19 MR. BABCOCK: IF I COULD HAVE A MOMENT FIRST,
20 PLEASE?

21 JUDGE YOUNG: CROSS-EXAMINATION?

22

23 CROSS-EXAMINATION

24 BY MR. FORD:

25 Q DO YOU RECALL SPECIFICALLY WHAT MR. KIRKHAM SAID

1 ABOUT THE RIPPING OF THE MATERIAL?

2 A I THINK WE JUST DISCUSSED THAT WITH HUGH AND
3 WE WENT THROUGH THE PROJECT, WE LOOKED AT IT AND WE KICKED
4 SOME ROCKS HERE AND THERE AND WE COME UP WITH THAT DECISION,
5 YES. HE SAID HE'S NOT--GOOD MATERIAL YOU CAN RIP IT.

6 Q MY QUESTION IS, DO YOU RECALL SPECIFICALLY WHAT
7 HE SAID?

8 A NOT EXACTLY. IT'S FIVE YEARS AGO. I CANNOT
9 SAY EXACTLY WHAT HE SAID, BUT I REMEMBER WE DID NOT PUT
10 ANY MONEY, OR THEY DID NOT PUT ANY MONEY BASED ON OUR CONVER-
11 SATION AFTER WE LEFT THE JOB WITH PROJECT ENGINEER OF
12 U.D.O.T. WE DON'T NEED TO HAVE ANY MONEY IN THE JOB TO
13 DO THE BLASTING BECAUSE WE CAN RIP IT.

14 Q OKAY. DO YOU RECALL HIM SAYING WHO THE PREVIOUS
15 CONTRACTOR HAD BEEN?

16 A NO.

17 Q DO YOU RECALL HIM TELLING YOU WHAT TYPE OF EQUIP-
18 MENT THE PREVIOUS CONTRACTOR USED?

19 A NO, I DON'T RECALL THAT.

20 Q DO YOU KNOW WHAT TYPE OF EQUIPMENT PROCON
21 INTENDED TO USE FOR THE PURPOSE OF RIPPING?

22 A I KNEW THEY HAVE A DOZER. I DON'T KNOW WHAT
23 TYPE THEY HAVE EXACTLY. I KNEW THEY HAVE THE TRUCKS AND
24 I KNEW THEY HAVE THE 155 DOZER. I BELIEVE THAT'S WHAT THEY
25 HAD. AND--

1 Q WELL--

2 A I DIDN'T GET INVOLVED TO WHAT TYPE OF DOZER USING

3 TO DO IT.

4 Q WELL, IF THE OTHER CONTRACTOR USED A LARGER,

5 MORE POWERFUL DOZER TO RIP THAN A 155 THAT WOULD BE IMPOR-

6 TANT TO KNOW, WOULDN'T IT?

7 A I THINK--THERE'S NO QUESTION MORE HORSEPOWER

8 EQUIPMENT IS GOING TO WORK FASTER THAN THE LESS HORSEPOWER

9 EQUIPMENT, BUT I DON'T BELIEVE HE'S GOING TO HAVE TOO SIGNI-

10 FICANT--IF YOU HAVE THE MONEY AND THE JOB TO DO IT, D155

11 YOU CAN DO IT. IT MIGHT TAKE A FEW HOURS LONGER TO DO IT

12 BUT IT'S STILL YOU CAN GET THE JOB DONE.

13 Q HAVE YOU WORKED AROUND CATERPILLAR EQUIPMENT?

14 A YES.

15 Q D8, D9'S?

16 A D8, D9, D10.

17 Q IS THERE A DIFFERENCE BETWEEN A D8 AND D9?

18 A THERE SURE IS.

19 Q IS IT A SIGNIFICANT DIFFERENCE?

20 A YES, I CAN SAY IT'S SIGNIFICANT. YOU CAN HAVE

21 A BETTER PRODUCTION FROM D9 THAN D8. IT'S MORE HORSEPOWER

22 AND MORE--YEAH, MORE POWER, MORE PUSH.

23 Q SO IF THE PREVIOUS CONTRACTOR SUCCESSFULLY RIPPED

24 IT WITH A D9 THEN ANYBODY BIDDING A JOB PLANNING TO RIP

25 IT OUT COULD PLAN ON USING A D9, SHOULDN'T THEY?

1 A I THINK THAT'S THE PERSONAL JUDGMENT WHEN YOU
2 LOOK AT THE MATERIAL. I DON'T BELIEVE AS THE ESTIMATOR
3 WOULD SEE WHAT THE OTHER CONTRACTORS DO. WE DO WHAT WE
4 HAVE AS A COMPANY. IF MY COMPANY HAS A D155 I'M GOING TO
5 BID THE JOB AT D155 BECAUSE THAT'S WHAT WE HAVE. AND IT
6 MIGHT TAKE ME LONGER TO DO IT BECAUSE I'VE GOT TO WORK
7 HARDER. THERE'S NO QUESTION D10 IS GOING TO PUSH MORE THAN
8 D8. BUT IF YOU DON'T HAVE THE D10 AND I GOT A D8 I'M NOT
9 GOING TO GO RENT A D10, I'M GOING TO USE THE D8 AND PUT
10 THAT COST IN MY ESTIMATE TO DO THE JOB WITH THE D8. THAT'S
11 MY PERSONAL OPINION.

12 Q ALL RIGHT.

13 A I THINK THE MANAGEMENT OF THE COMPANY WANTS YOU
14 TO USE THE EQUIPMENT; THEY DON'T WANT TO RENT EQUIPMENT.

15 Q WHEN YOU WERE ON THIS SITE AT THE SITE VISIT
16 DID YOU OBSERVE ANY STAKES THAT WERE PLACED WITHIN THE PRO-
17 JECT LIMITS?

18 A I DON'T RECALL ANY STAKES MIGHT BE THERE. I
19 DON'T KNOW.

20 Q DO YOU RECALL ANY DISCUSSION ABOUT THE ANGLE
21 OF THE SLOPES?

22 A NO. BASICALLY, WE LOOK AT THE PLANS. WHEN WE
23 BID THE JOB WE LOOK AT THE PLANS AND WE BASE ON WHAT THE
24 PLANS IS TELLING US, SLOPE IS 1:1, 2:1, 1/2:1, WE ACCORDINGLY
25 PUT OUR COST BASED ON THAT SLOPE. AND I PERSONALLY THINK

Tab 12

1 350 FOOT AVERAGE PUSH. THEY SHOW AN AVERAGE PRODUCTION
2 ON FLAT GROUND OF 300 CUBIC YARDS AN HOUR.

3 SO YOU TAKE THE 350 CUBIC YARDS AN HOUR, MULTIPLY
4 IT BY ONE AND A HALF MACHINES, EFFECTIVELY TO WORKING TO
5 PUSH, TIMES THE DOWNHILL FACTOR OF 1.2, TIMES THE SLOTT DOZING
6 FACTOR OF 1.2, AND YOU DIVIDE THAT INTO THE NUMBER OF LOOSE
7 CUBIC YARDS PER--TOTAL LOOSE CUBIC YARDS TO BE MOVED--YOU
8 COME UP WITH 61 HOURS. YOU DIVIDE THAT BY AN EFFICIENCY
9 FACTOR OF 83 PERCENT.

10 CATERPILLAR QUANTIFIES THE FACT THAT THE MACHINE
11 MAY NOT BE 100 PERCENT EFFICIENT BY SAYING IF THE MACHINE'S
12 WORKING ABOUT 50 MINUTES PER HOUR AND IT RANGES FROM 30
13 MINUTES PER HOUR UP TO 60 MINUTES PER HOUR, THEN THAT
14 REFLECTS REALITY, THAT A MACHINE NEVER WORKS REALLY 60
15 MINUTES PER HOUR, IT HAS TO STOP FOR FUEL, IT HAS TO STOP
16 FOR SOMEBODY, SOMEONE TO GET OUT OF ITS WAY, TO CHECK THE
17 OIL. THERE ARE A NUMBER OF THINGS THAT IT HAS TO DO,
18 INCLUDING DOWN TIME WHEN THE MACHINE IS ACTUALLY BROKEN
19 DOWN. SO I'VE USED 50 MINUTES PER HOUR, OR 83 PERCENT
20 EFFICIENCY, WHICH CONVERTS 61 HOURS TO 73 HOURS OF ACTUAL
21 WORKING TIME.

22 I FIGURE THAT A D7 DOZER, THAT IS A CATERPILLAR
23 MACHINE, COULD BE WORKING AT THE BOTTOM OF THE FILL,
24 SPREADING IT, AND ANOTHER COMPACTOR, SELF-PROPELLED COMPACTOR
25 AT THE BOTTOM OF THE FIELD COMPACTING THE MATERIAL INTO

1 THE 90 PERCENT SPECIFIED FOR WASTE MATERIAL.

2 THEN I'VE PUT A COST SUMMARY. EACH MACHINE,
3 THE NUMBER OF HOURS THAT YOU WOULD EXPECT IT TO WORK, THE
4 INTERNAL RATE FOR PROCON, WHICH THEY SUPPLIED ME--WHICH
5 I HAVE TO SAY I LOOK AT AND I THINK THOSE ARE PLENTY LOW--
6 AND THEN AN EXTENSION. YOU ADD THAT UP AND COME UP WITH
7 32,544, OR DIVIDED BY THE NUMBER OF BANK CUBIC YARDS TO
8 BE EXCAVATED AND COME UP WITH .81 CENTS A CUBIC YARD.

9 Q SO THE HOURLY RATES WERE SUPPLIED TO YOU BY
10 PROCON?

11 A THEY WERE. THAT IS THEIR INTERNAL RATE THAT
12 THEY HAVE CALCULATED AND USED INTERNALLY. IT'S THEIR ACTUAL
13 COST. AND I SAY, I VIEW THEM TO BE, IF ANYTHING, ON THE
14 LOW SIDE.

15 Q ALL RIGHT. NOW, HAVE YOU MADE AN ANALYSIS OF--
16 WELL, LET'S CONTINUE ON.

17 A THAT'S THE WAY THAT I WOULD EXPECT THAT WORK
18 TO BE DONE AS BID.

19 NOW, IF YOU MAKE THE ASSUMPTION, OR YOU DON'T
20 HAVE TO MAKE AN ASSUMPTION, IN ORDER TO MOVE THAT MATERIAL
21 TO THE SITE WHERE IT WAS ACTUALLY PLACED, YOU WOULD HAVE
22 TO USE THE HAUL TRUCKS. I HAVE CALCULATED THAT 17 CUBIC
23 YARDS IS ABOUT THE AMOUNT, BANKED CUBIC YARDS IS ABOUT THE
24 AMOUNT THAT YOU COULD PUT ON THAT TRUCK. AND I HAVE BASED
25 MY CALCULATIONS ON THAT.

1 PROCON HAS INDICATED TO ME THAT THEY HAD, THEY
2 WERE ABLE TO GET LESS ON THE TRUCK THAN THAT BUT I'VE STUCK
3 WITH THE 17 YARDS. IF YOU GO WITH A SMALLER TRUCK LOAD,
4 FEWER CUBIC YARDS ON THE TRUCK, IT'S REALLY GOING TO BALLOON
5 THESE FIGURES UP AND MAKE THE COST DIFFERENCE EVEN GREATER.

6 I'VE ASSUMED A LOAD TIME OF 1.75 MINUTES FOR
7 EACH TRUCK. I'VE AGAIN REFERRED TO THE REFERENCE BOOK THAT
8 CATERPILLAR PUBLISHES. THEY SHOW A CHART FOR EACH OF THESE
9 TRUCKS. AND I HAVE TO SAY THAT THIS D400 UNIT, ALTHOUGH
10 IT WAS NOT BUILT BY CATERPILLAR, THAT COMPANY WAS BOUGHT
11 BY CATERPILLAR AND CATERPILLAR STILL CONTINUES TO BUILD
12 THESE UNITS. SO THE PRODUCTION FIGURES I'M TAKING FROM
13 THE BOOK ARE EXACT, THEY'RE NOT A COMPARABLE MACHINE.

14 GOING DOWNHILL IN THAT SLOPE YOU'RE GOING DOWN-
15 HILL SO EVEN THOUGH YOU HAVE A 30 TO 35 PERCENT DOWNHILL
16 SLOPE YOU DO HAVE SOME ROLLING RESISTANCE SO YOU WOULD USE,
17 AGAIN THIS IS A JUDGMENT, I USED 25 PERCENT ROLLING RESIS-
18 TANCE DOWNHILL. THIS MANDATES, FROM THE BOOK, FIRST GEAR
19 WITH A MAXIMUM OF THREE MILES PER HOUR. AND I HAVE ASSUMED
20 THAT AN AVERAGE SPEED WOULD BE THREE MILES AN HOUR. THAT'S
21 A MAXIMUM SPEED ACCORDING TO THE BOOK. AND I DON'T THINK
22 THAT YOU MAINTAIN THE MAXIMUM SPEED GOING DOWNHILL. BUT
23 THERE WILL BE A LITTLE BIT OF TRAVEL ON THE LEVEL GROUND
24 AT THE TOP AND, PERHAPS A LITTLE DOWN AT THE BOTTOM. YOU
25 CAN SPEED UP A LITTLE BIT. SO I'VE JUST HAD THAT THREE

1 ASSUMING THAT THE TRUCK STARTS AT THE TOP OF THE AREA, OR
2 AT THE BOTTOM, RATHER, HE MOVES UPHILL TO THE LOADING AREA
3 AT THREE MILES AN HOUR, GETS LOADED AT 1.75 MINUTES, CRAWLS
4 DOWNHILL AT ONE AND A HALF MILES AN HOUR. AND AGAIN, I'VE
5 TAKEN THESE FROM THE CATERPILLAR HANDBOOK. THEN HE HAS
6 A FLAT HAUL. SO I FIGURED THAT SEPARATELY TO THE DESIGNATED
7 WASTE AREA. HE'S HAULING AT SIX MILES AN HOUR, FULL, HE
8 DUMPS IT IN A MINUE AND A HALF, AND RETURNS AT EIGHT MILES
9 AN HOUR. THAT TOTAL CYCLE TIME IS 12.39 MINUTES. I HAVE
10 INCLUDED LOAD TIME IN THAT BECAUSE IT IS IN THE "CRITICAL
11 PASS." NOBODY'S WAITING. THAT LOADED TRUCK IS NOT WAITING
12 FOR THE NEXT TRUCK TO RETURN.

13 85,000 CUBIC YARDS DIVIDED BY 17 YARDS, TIMES
14 12.39 MINUTES PER LOAD, COMES OUT TO BE 1,042 HOURS.

15 NOW, FOR 1,042 HOURS OF TRUCK TIME, HALF THAT
16 AMOUNT OF TIME FOR ALL THE OTHER EQUIPMENT, OF COURSE, THERE
17 WAS THE 40 HOURS FOR THE DOZER, YOU COME DOWN DOING THE
18 SAME CALCULATION THAT WE HAVE DONE BEFORE, TOTAL COST OF
19 \$297,003.47 PER CUBIC YARD TO MOVE THAT SOIL.

20 NOW, YOU HAVE TO BE CAREFUL HERE. IT'S NOT JUST
21 THE YARDAGE OR THE PER YARD DIFFERENCE TIMES THE TOTAL YARDS.
22 YOU HAVE THE TOTAL, OR YOU HAVE THE CUBIC YARD PRICE OF
23 347--LET ME SEE HERE. YEAH, YOU HAVE A DIFFERENCE IN COST
24 OF .51 CENTS A YARD BETWEEN \$3.47 AND \$2.69. YOU MULTIPLY
25 THAT TIMES THE NUMBER OF YARDS THAT WERE MOVED, ACTUALLY

1 MOVED OUT OF THE CUT, AND COME UP WITH 43,750. SO THAT
2 WOULD BE COMBINED WITH THE COST OF MOVING THE MATERIAL FROM
3 THE WASTE SITE, DESIGNATED WASTE SITE, TO THE ACTUAL STAKED
4 WASTE SITE, OR THE EMBANKMENT AREA.

5 Q SO THAT'S THE CALCULATIONS AS FAR AS WE'VE DIS-
6 CUSSED IT.

7 A THERE IS A QUESTION OF BLASTING WHICH I'VE
8 INCLUDED ON PAGE 9 HERE. DO YOU WANT TO ADDRESS THAT NOW?

9 JUDGE YOUNG: PRIOR TO ADDRESSING THAT LET'S
10 TAKE A RECESS.

11 (RECESS).
12

13 JUDGE YOUNG: YOU MAY CONTINUE, MR. BABCOCK.

14 Q (BY MR. BABCOCK) BEFORE WE GET TO THE COMPUTATION
15 ABOUT IMPACTS OF BLASTING, IN YOUR REVIEW OF THE PLANS DID
16 YOU HAVE OCCASION TO REVIEW THE REMARKS SECTION ON SHEET
17 3 THAT HAS STATEMENTS ABOUT ANTICIPATED SHRINK, SWELL?

18 A YES, I HAVE.

19 Q ALL RIGHT. DOES THAT NOTE INDICATE ANYTHING
20 TO YOU AS YOU WOULD REVIEW THOSE PLANS AS A POTENTIAL BIDDER
21 FOR THE PROJECT?

22 A WELL, THE STATEMENTS THAT THERE'LL BE A FIVE
23 PERCENT SWELL IN THE SOLID ROCK, THAT'S A FAIRLY LOW NUMBER.
24 THAT INDICATES TO ME THAT THAT ROCK IS NOT PRESENTLY VERY
25 DENSE, THAT IT'S MAYBE BROKEN, LOOSE, THAT THE SWELL, WHEN

1 YOU PICK IT UP AND YOU MOVE IT AND YOU COMPACT IT BACK,
2 THAT THE SWELL IS ONLY FIVE PERCENT, MEANS THAT IT'S NOT
3 NOW IN A HIGHLY COMPACT DENSE STATE.

4 Q WOULD YOU BE ABLE TO DRAW ANY CONCLUSION AS TO
5 WHETHER OR NOT YOU WOULD ANTICIPATE HAVING TO DO ANY BLASTING
6 OR SHOOTING OF THAT KIND OF MATERIAL?

7 A THAT WOULD NOT INDICATE TO ME THAT YOU'D HAVE
8 TO BLAST IT ALL, NO. THAT'S A FIVE PERCENT SWELL WHICH
9 IS QUITE SMALL. AND I WOULD THINK THAT ROCK WOULD PROBABLY
10 RIP QUITE READILY.

11 Q HAVE YOU SINCE LEARNED OR BEEN INFORMED THAT,
12 IN FACT, THE MATERIAL WAS, THAT A LOT OF SHOOTING DID OCCUR?

13 A YES, I HAVE.

14 Q WHAT DO YOU UNDERSTAND ABOUT THAT, WHAT KIND
15 OF SHOOTING OCCURRED? DO YOU KNOW MUCH ABOUT THE DETAILS
16 OF THE SHOOTING?

17 A I DON'T HAVE A LOT OF DETAIL ON THAT. I KNOW
18 THAT SHOOTING WAS REQUIRED WHEN THEY GOT INTO THE JOB.
19 IT'S MY UNDERSTANDING THEY DID NOT ANTICIPATE SHOOTING BUT
20 THAT THERE WAS A SIGNIFICANT AMOUNT OF SHOOTING, AND
21 CERTAINLY A COST OVERRUN, CERTAINLY DIFFERENT THAN WAS ANTI-
22 CIPATED IN THE BID.

23 Q DID YOU LOOK AT SOME NUMBERS OF CALCULATIONS
24 ABOUT SHOOTING VERSUS RIPPING?

25 A YES, I DID. I MADE SOME COMPARISONS. AND IF

1 YOU WANT TO REFER TO SHEET 9 OF THIS COST CALCULATION THAT
2 I PREPARED, THERE WERE A TOTAL OF 205,700 CUBIC YARDS OF
3 EXCAVATION ON THE JOB AS IT WAS CONSTRUCTED. IT'S MY EXPER-
4 IENCE IN LOOKING AT THE PHOTOGRAPHS, BOTH THE PHOTOGRAPHS
5 THAT WERE TAKEN PRIOR AND DURING CONSTRUCTION, AS WELL AS
6 THE PHOTOGRAPHS TAKEN RECENTLY, AFTER CONSTRUCTION, THAT
7 YOU'RE NOT GOING TO HAVE TO BLAST EVERYTHING IN THIS AREA,
8 BUT THAT THE BLASTING THAT WAS REQUIRED BY SITE CONDITIONS
9 OCCURRED IN, MORE OR LESS, LEDGES, AREAS THAT WOULD HAVE
10 TO BE BROKEN. AND THIS IS FAIRLY CONSISTENT WITH THE
11 BLASTING THAT'S DONE IN NORTH SALT LAKE. THAT'S AN EVEN
12 MORE SOLID ROCK OR CONSISTENT ROCK, BUT A LOT OF IT CAN
13 BE RIPPED, BUT THERE'S 10 TO 20 PERCENT OF IT THAT HAS TO
14 BE BLASTED. YOU'LL HIT HARD SPOTS, YOU'LL HIT LAYERS THAT
15 ARE HARDER AND CANNOT BE RIPPED ECONOMICALLY OR YOU'LL HIT--
16 YOU CAN'T REALLY EXPLAIN IT, BUT YOU'LL HAVE, YOU'LL BE
17 ABLE TO RIP PART OF A LAYER AND THEN YOU'LL HIT A HARD SPOT
18 IN THE SAME LAYER THAT CAN'T BE RIPPED. BUT IT APPEARS
19 TO ME THAT THERE ARE STRATA IN THIS ROCK THAT ARE HARDER,
20 THAT ARE MORE MASSIVE AND CANNOT BE RIPPED.

21 SO I'VE MADE A FIGURE, OR AN ESTIMATE, ABOUT
22 20 PERCENT OF THE MATERIAL EXCAVATED WOULD HAVE TO BE BLASTED,
23 BECAUSE IT'S TOO SOLID, TOO MASSIVE, TOO DENSE TO EFFEC-
24 TIVELY RIP.

25 IF YOU TAKE THAT 20 PERCENT TIMES THE TOTAL OF

1 2,000--OR 200,000 CUBIC YARDS IN A JOB, I CAME OUT WITH
2 41,000 PLUS CUBIC YARDS OF MATERIAL TO BE BLASTED.

3 HERE IN SALT LAKE CITY THE SAME, AS I UNDERSTAND
4 IT, THE SAME SUBCONTRACTOR THAT WORKED ON THIS JOB HAS DONE
5 SOME BLASTING HERE FOR ME IN SALT LAKE CITY AND HAS CHARGED
6 ME \$1.25 PER CUBIC YARD. NOW THAT'S IN SALT LAKE. DOWN
7 ON THIS PROJECT LABOR IS ABOUT THREE TIMES WHAT YOU'D HAVE
8 TO PAY HERE IN SALT LAKE BECAUSE IT'S A DAVIS BACON WAGE,
9 I THINK. I'M NOT SURE. I DIDN'T LOOK AT THE CLAUSE OF
10 IT BUT PROCON SUPPLIED ME THE LABOR THAT THEY'VE HAD TO
11 PAY THEIR MEN AND I MAKE--WHICH I THINK IS A REASONABLE
12 ASSUMPTION THAT THE BLASTING SUBCONTRACTOR IS GOING TO HAVE
13 A SIMILAR EXPERIENCE, ABOUT THREE TIMES THE LABOR COSTS
14 THAT HE WOULD HAVE HERE.

15 IF 30 PERCENT OF THE COST OF BLASTING IS LABOR
16 AND THAT LABOR IS THREE TIMES THAT YOU'D HAVE IN PRIVATE
17 WORK IN SALT LAKE THEN YOU'D HAVE TO CREATE A FACTOR FOR
18 MULTIPLYING TIMES THE SALT LAKE COST OF BLASTING TO ACCOMMO-
19 DATE THE INCREASED LABOR COSTS. AND I SHOW A FORMULA THERE,
20 WORKING THE FORMULA THROUGH IT COMES OUT A FACTOR OF 1.9
21 TIMES THE COST FOR OUT-OF-TOWN WORK.

22 NOW, YOU ALSO HAVE POOR BLASTING CONDITIONS ON
23 THIS PROJECT. I MENTIONED THAT THERE WERE STRATA THAT
24 APPEARED TO ME THAT WOULD HAVE TO BE BLASTED, BUT NOT EVERY-
25 THING. AND THAT MAKES IT DIFFICULT TO BLAST. IT'S DIFFICULT

1 TO CONTAIN THE PRESSURE THAT'S DEVELOPED BY THE BLASTING
2 AGENT. YOU HAVE, AS YOU DRILL THROUGH, YOU HIT CRACKS,
3 YOU'VE GOT PASSAGE WAYS FOR THE BLASTING GASES TO ESCAPE,
4 AND IT ALSO MAKES IT MORE DIFFICULT DRILLING. SO I'VE
5 APPLIED A FACTOR OF 1.2 FOR THOSE POOR BLASTING CONDITIONS.

6 SO YOU TAKE THE EXPECTED SALT LAKE PRICE OF \$1.25,
7 MULTIPLY IT BY 1.9 FOR OUT-OF-TOWN COSTS, TIMES 1.2 FOR
8 THE DIFFICULTY OF THE BLASTING. YOU COME OUT WITH \$2.85
9 A CUBIC YARD.

10 MULTIPLY THAT TIMES 41,000, I HAVE GOT 117,000
11 ADDITIONAL COSTS PER BLASTING. THAT'S VERY ROUGH AND QUITE
12 CONSERVATIVE, I THINK. THERE IS SIGNIFICANT MONEY INVOLVED
13 IN BLASTING.

14 Q OKAY. AND THEN IF YOU COULD SUMMARIZE THE COST
15 IMPACTS.

16 JUDGE YOUNG: LET ME ASK YOU THIS. HAD YOU BEEN
17 AWARDED THIS BID WOULD YOU ANTICIPATE THAT THE BLASTING
18 THAT HAD BEEN ENCOUNTERED WOULD HAVE BEEN INCLUDED WITHIN
19 YOUR BID PRICE OR WOULD THAT HAVE BEEN--WOULD THAT HAVE
20 BEEN--WOULD THAT BE A LEGITIMATE CHANGE THAT WOULD JUSTIFY
21 EXTRA COMPENSATION?

22 THE WITNESS: IF I WERE BIDDING THE PROJECT?

23 JUDGE YOUNG: WELL, YOU DID. SO IF YOU HAD BEEN
24 AWARDED--

25 THE WITNESS: WE DID BID THE PROJECT. WE DID

1 BID THE PROJECT.

2 JUDGE YOUNG: IN FACT, I SEE YOUR BID IS
3 \$784,000.00. HAD YOU BEEN AWARDED THIS BID WOULD YOU HAVE
4 CONSIDERED THE BLASTING COSTS TO HAVE BEEN SOMETHING THAT
5 YOU WOULD HAVE HAD TO ABSORB WITHIN YOUR BID?

6 THE WITNESS: NO, I WOULD HAVE MADE A CLAIM,
7 GIVEN WHAT I'VE BEEN TOLD BOTH BY THE ESTIMATOR THAT WORKED
8 FOR ME AT THE TIME AND BY PROCON'S PEOPLE, I WOULD HAVE
9 ASKED, PUT IN A CLAIM FOR ADDITIONAL MONEY FOR BLASTING.
10 WE DID NOT INCLUDE, IN MY REVIEW OF THE BID, THAT I REMEMBER,
11 WE DID NOT INCLUDE BLASTING ON THE PROJECT.

12 JUDGE YOUNG: OKAY.

13 Q (BY MR. BABCOCK) COULD YOU REVIEW BRIEFLY THE
14 COST SUMMARY?

15 A PAGE 10 IS THE SUMMARY. THAT MATERIAL THAT WAS
16 TO BE DOZED INTO THE DESIGNATED WASTE SITE, 40,000 CUBIC
17 YARDS, TO ACTUALLY TRUCK IT DOWN INTO THE HOLE, I CALCU-
18 LATED, WOULD BE \$5.96 A CUBIC YARD, TO DOZE IT IN, AS WAS
19 ANTICIPATED IN THE BID, WAS .81 CENTS, FOR A DIFFERENCE
20 OF \$5.15. YOU MULTIPLY THAT TIMES THE 40,000 CUBIC YARDS
21 IS \$206,000.00.

22 THE OTHER MATERIAL THAT WAS, WOULD HAVE BEEN
23 HAULED UNDER CONTRACT CONDITIONS INTO THE WASTE AREA BUT
24 INSTEAD HAD TO BE HAULED TO THE STAKED WASTE AREA, OR TO
25 THE EMBANKMENT AREA UNDER THE ORIGINAL CONTRACT, COST \$5.96.

1 I CALCULATED THAT IT WOULD HAVE COST TO HAUL THE DESIGNATED
2 WASTE AREA \$2.19, A DIFFERENCE OF \$3.77. MULTIPLY THAT
3 BY THE YARDAGE AND YOU COME OUT WITH \$301,000.00.

4 THEN THE SLIVER CUT, THERE WAS 85,000 YARDS,
5 WHICH I CALCULATE WOULD HAVE COST \$3.47. THE COST FOR EXCA-
6 VATING THAT MATERIAL DEPICTED IN GREEN ON THIS EXHIBIT,
7 9-P, I CALCULATED WOULD HAVE COST \$2.96, A DIFFERENCE OF
8 .51 CENTS A CUBIC YARD, \$43,000.00.

9 THEN YOU ADD IN THE BLASTING OF 117,000, YOU
10 ADD THOSE FOUR FIGURES--216, 301, 43, 117, TO GET A TOTAL
11 OF \$668,279.00.

12 Q THERE'S ANOTHER SUMMARY ON PAGE 11. HOW DOES
13 THAT COMPARE?

14 A WELL, IF YOU CONSIDER THE MATERIAL THAT WAS IN
15 THE SLIVER CUT, THAT MATERIAL, IN ACTUALITY, WAS HAULED
16 BEYOND THE DESIGNATED WASTE AREA AND WAS PUT IN TO WHAT
17 ORIGINALLY WAS THE EMBANKMENT AREA. IT WAS PLACED ON TOP
18 OF THE STRUCTURAL EMBANKMENT. SO IF YOU WANT TO TAKE THE
19 COST OF MOVING THAT MATERIAL FROM THE CUT SECTION ALL THE
20 WAY TO WHERE IT WAS ACTUALLY PLACED, THEN YOU TAKE THE COST
21 OUT OF THE SHORT HAUL VERSUS LONG HAUL AND ADD IT IN ON
22 THE SLIVER CUT. THE TOTAL IS THE SAME AS TO THE FIRST
23 SUMMARY BUT I'VE ADDED THAT COST TO THE SHORT HAUL VERSUS
24 THE LONG HAUL INTO THE CONSIDERATION FOR THE SLIVER CUT.

25 Q THANK YOU. A FEW MORE QUESTIONS. HOW WOULD

1 THESE CHANGES THAT YOU'VE NOTED FROM THE PLANS AS DESIGNED,
2 TO THE PROJECT AS CONSTRUCTED, AFFECT THE TIME THAT IT WOULD
3 TAKE TO COMPLETE THE PROJECT?

4 A IT WOULD HAVE LENGTHENED IT CONSIDERABLY. LET'S
5 SEE. 260 HOURS, 570. THAT'S 830 HOURS. I THINK IT WOULD
6 HAVE TAKEN PROBABLY 120 EXTRA DAYS.

7 Q OKAY.

8 A WORKING DAYS.

9 Q DO YOU THINK THAT UNDER THE CIRCUMSTANCES THERE
10 WOULD BE A JUSTIFIABLE CLAIM TO HAVE THE CONTRACT TIME
11 EXTENDED THEN BEYOND THE 90 DAY WORKING DAY CONTRACT PERIOD?

12 A OH, MOST CERTAINLY, YES.

13 Q SOMEWHERE IN THE RANGE OF MAYBE UP TO 120 DAYS?

14 A YES.

15 Q ADDITIONAL TIME?

16 A ADDITIONAL TIME.

17 Q IN ESSENCE, IT WOULD BE MORE THAN DOUBLE THE
18 TIME TO DO THE JOB.

19 A YES.

20 Q WHEN YOU REVIEW THE PLANS AND THE SPECIFICATIONS--
21 LET ME JUST JUMP AHEAD AND POINT OUT A PARTICULAR SPECIFI-
22 CATION NO. 11. IF YOU WILL REVIEW SHEET 11 SPECIFICATIONS
23 QUICKLY AGAIN.

24 A YES.

25 Q WHEN YOU REVIEW THE PLANS, AND IN CONJUNCTION

1 THE WITNESS: WELL, I DON'T--
2 JUDGE YOUNG: THERE'S AN OBJECTION.
3 MR. BABCOCK: I DON'T KNOW THAT THIS WITNESS
4 IS QUALIFIED TO SAY WHAT THE COURTS UNIVERSALLY DO.
5 JUDGE YOUNG: THE OBJECTION IS SUSTAINED.
6 THE WITNESS: THANK YOU.
7 Q (BY MR. FORD) NOW, LET ME SEE IF I UNDERSTAND.
8 GOING BACK TO PAGE 1 OF YOUR EXHIBIT YOU'VE MADE AN ANALYSIS
9 BASED UPON WHAT YOU WERE TOLD, THAT PROCON BID THE PROJECT
10 TO MOVE 40,000 YARDS OF MATERIAL. IS THAT RIGHT?
11 A YES. AND I THINK THAT'S CONSERVATIVE.
12 Q SO YOU'VE TAKEN THESE AS IF YOU WERE CONSTRUCTING
13 A BID, YOU'VE MADE THESE ANALYSES?
14 A YES.
15 Q DID YOU USE--WHERE DID YOU GET THESE FIGURES
16 FROM? DID YOU CONSTRUCT THESE YOURSELF?
17 A IS THERE ONE MATERIAL FIGURE THAT YOU QUESTION?
18 I THINK I EXPLAINED MANY OF THEM. I GOT THEM OUT OF THE
19 CATERPILLAR CATALOG. OR REFERENCE BOOK.
20 Q OKAY. AND THEN THE EQUIPMENT COSTS WERE PROVIDED
21 YOU BY PROCON; IS THAT RIGHT?
22 A THAT'S CORRECT.
23 Q AND YOU SAY THESE ARE THEIR INTERNAL RATES?
24 A THAT'S CORRECT.
25 Q SO YOU CONSTRUCTED THOSE FIGURES JUST AS IF YOU

1 WERE CONSTRUCTING YOUR OWN BID.

2 A YES.

3 Q THEN WHAT ARE THE NEXT SET OF FIGURES? WHAT
4 ARE THOSE SUPPOSED TO REPRESENT?

5 A ON PAGE 2?

6 Q YEAH. WHAT ARE THEY SUPPOSED TO REPRESENT?

7 A DOWN AT COST SUMMARY?

8 JUDGE YOUNG: CAN YOU MAKE YOUR QUESTION MORE
9 SPECIFIC?

10 Q (BY MR. FORD) WELL, YOU'VE INCREASED THE FIGURES
11 --YOU'VE ADDED IN A LOT OF ASSUMPTIONS AND I'M JUST WONDERING
12 WHAT ARE THESE FIGURES SUPPOSED TO REPRESENT. IS THIS THE
13 WAY THE PROJECT WAS SUPPOSED TO HAVE BEEN DONE?

14 A NO. THE FIRST SECTION IS THE WAY THAT THE PRO-
15 JECT WAS BID, AND I SAY WAS THE LEGITIMATE WAY OF LOOKING
16 AT IT, GIVEN THE CONDITIONS THAT WERE LAID OUT IN THE PLANS
17 AND SPECIFICATIONS.

18 Q OKAY.

19 A BUT WHEN THE CONTRACTOR ARRIVED ON THE JOB HE
20 WAS GIVEN DIFFERENT DIRECTIONS. HE WAS TOLD TO CHANGE THE
21 WASTE AREA, YOU CAN'T--DON'T PUT IT OVER HERE, PUT IT OVER
22 HERE. NEVER MIND WHAT IT SAID ON THE PLANS.

23 Q OKAY. NOW LET ME ASK YOU. ARE YOUR FIGURES
24 BASED UPON THE WAY HE WAS REQUIRED TO DO IT, ARE THEY BASED
25 ON ASSUMPTIONS, OR ARE THEY BASED ON ACTUALITY?

1 A NO, THOSE ARE BASED ON SOME ASSUMPTIONS.

2 Q OKAY. SO THIS AGAIN IS, THOUGH, YOU WERE BIDDING

3 IT BUT USING THE ALTERED METHOD REQUIRED BY THE ENGINEER.

4 A NOT ENTIRELY. IT'S TEMPERED BY THE EXPERIENCE

5 THAT ACTUALLY OCCURRED.

6 Q WELL, TELL ME WHERE YOU'VE TEMPERED IT.

7 A WELL, FOR ONE THING, I WAS TOLD THAT THE D7 DOZER

8 AT THE BOTTOM OF THE FILL WAS INSUFFICIENT TO MOVE THE

9 MATERIAL AROUND AND SPREAD IT FOR COMPACTION AND SO I PUT

10 A D155A KOMATSU IN.

11 Q ALL RIGHT.

12 A IT'S THINGS LIKE THAT. I'VE USED THE EQUIPMENT

13 SPREAD THAT PROCON HAS INFORMED ME THAT THEY ACTUALLY USED.

14 Q OKAY. NOW, YOU'VE ASSUMED ONE-WAY TRAFFIC IN

15 THESE.

16 A THAT'S CORRECT.

17 Q AND I ASSUME THAT THIS ASSUMES THAT ONE-WAY

18 TRAFFIC CONDITION WOULD CONTINUE THROUGHOUT THE AREA, OR

19 PERIOD OF TIME, THAT THEY HAULED IN THE WASTE AREA. IS

20 THAT CORRECT?

21 A I HAVE NOT ALLOWED FOR A TWO-WAY AREA HERE, NO.

22 Q SO YOU'VE TAKEN THE WORST CASE AND APPLIED IT

23 THROUGHOUT.

24 A NO, I'VE TAKEN AN AVERAGE. I DID NOT INCLUDE

25 THE TWO-WAY TRAFFIC AREA BECAUSE I FIGURED THAT THAT IS

1 GOING TO COME NEAR THE END. THERE WAS SOME ADDITIONAL FILL
2 THAT APPEARED, TO ME, WAS SOMETHING THAT WAS NOT IN THE
3 CONTRACT, BUT I WAS INFORMED IT WAS PUT THERE AT PROCON'S
4 CONVENIENCE IN ORDER TO PROVIDE THE TWO-WAY TRAFFIC. AND
5 IT CAME NEAR THE END OF THE PROJECT. SO THAT IN THESE EARLY
6 STAGES WHEN THE MATERIAL'S BEING WASTED, NO, I DID NOT
7 INCLUDE TWO-WAY TRAFFIC.

8 Q OKAY. NOW, YOU HAD TO CONSTRUCT AN ACCESS DOWN
9 TO THE BOTTOM OF THAT HOLE IN ORDER TO HAUL MATERIAL DOWN
10 FOR THE GRADE.

11 A THAT'S CORRECT. SO I HAVE NOT PUT ANYTHING IN
12 THERE TO ALLOW FOR THE CONSTRUCTION OF THAT HAUL ROAD--

13 Q OKAY.

14 A --THAT HAD TO BE IN PLACE.

15 Q NOW, YOUR HAULING TIME AND YOUR RETURN TIME YOU
16 ASSUMED A CONSTANT THROUGHOUT THE TIME THAT THEY HAULED
17 THIS 125,000 YARDS OF WASTE MATERIAL, HAVEN'T YOU?

18 A YES, I HAVE. I USED AN AVERAGE. ACTUALLY, I
19 HAD IN THERE HALF THOSE AND THEN I REALIZED THAT THAT WAS
20 THE WORST CASE, AS YOU'RE SUGGESTING, AND USED THE FIGURES
21 THAT I HAVE HERE NOW TO MAKE AN AVERAGE.

22 Q THESE FIGURES YOU'RE SAYING ARE AN AVERAGE?

23 A YES. LET ME REPEAT, THAT THREE MILES PER HOUR,
24 FOR EXAMPLE, NEAR THE TOP OF PAGE 2, HAULING TIME THREE
25 MILES PER HOUR, THAT'S THE MAXIMUM THAT YOU TAKE FROM THE

1 CATERPILLAR BOOK. AND I DON'T THINK YOU'RE GOING TO ACHIEVE
2 THAT MAXIMUM ALL THE TIME BUT THAT'S WHAT I'VE USED.

3 Q WELL, AS YOUR FILL COMES UP YOUR GRADES BECOME
4 LESS, MORE OPPORTUNITY TO INCREASE ACCESS WOULD SEEM THAT
5 THE HAULING UNIT SPEEDS WOULD PICK UP. THEY USUALLY DO,
6 DON'T THEY?

7 A YES, THAT'S WHY I'VE USED AN AVERAGE OF THREE
8 RATHER THAN TRYING, RATHER THAN SAYING IT IS ONE AND A HALF
9 MILES AN HOUR, WHICH IS THE WAY I ORIGINALLY CALCULATED IT.

10 Q LET ME REFER YOU TO EXHIBIT 60-D. THIS WAS TAKEN
11 ON JUNE 16TH. I'LL POINT OUT TO YOU THAT DOWN IN THIS
12 LOCATION THERE IS AN OUTLET FOR A PIPE. THIS MATERIAL ON
13 THIS SIDE REPRESENTS THE ROADWAY FILL COMING UP THIS MATERIAL
14 STARTING AT THIS POINT, AND COMING UP HERE IN THIS AREA
15 IS WASTE FILL. YOU UNDERSTAND THAT?

16 A I UNDERSTAND.

17 Q NOW, THIS ELEVATION AT THIS POINT, AND I'M
18 REFERRING TO THE WASTE FILL ON THE SOUTH END OF IT, IS THE
19 SAME ELEVATION AS THIS AROUND HERE, OR AT LEAST IT APPEARS
20 THAT WAY IN THE PHOTOGRAPH, DOESN'T IT?

21 A IT APPEARS TO BE BUT IT'S DIFFICULT TO JUDGE.

22 Q YOU ARE FAMILIAR WITH THE REQUIREMENT IN THE
23 PLANS THAT PROVIDES FOR A 2:1 SLOPE, AREN'T YOU, ON THE
24 FILL SECTIONS?

25 A MM-HMM. (YES).

1 Q THAT WOULD APPLY TO THE WASTE FILL AS WELL AS
2 TO THE ROADWAY FILL. IS THAT YOUR UNDERSTANDING?

3 A I DON'T--I'M NOT FAMILIAR WITH ANYTHING THAT
4 WOULD CONTRADICT THAT, NO.

5 Q OKAY. SO IF THEIR WASTE FIELD IS STAKED DOWN
6 IN THIS LOCATION AND IT REQUIRES A 2:1 THEN THAT 2:1 SLOPE
7 IS THE POINT AT WHICH YOU HAVE TO GO OUT IS DETERMINED BY
8 THE DEPTH OF THE HOLE IN ORDER TO CREATE A 2:1 SLOPE, ISN'T
9 IT?

10 A WELL, IF YOU'RE REQUIRED TO DO EXACTLY A 2:1
11 SLOPE, YES.

12 Q SO IF, AT THIS POINT, ALL OF THIS ELEVATION
13 IS APPROXIMATELY THE SAME, THIS IS WITHIN THE DESIGNATED
14 WASTE AREA, THIS IS WITHIN THE--IS OUTSIDE THE WASTE DESIG-
15 NATED AREA ON THE PLANS, BUT IF THE CONTRACTOR PUSHES
16 MATERIAL OUT IN HERE HE'S GOING TO HAVE TO HAVE A SLOPE
17 THAT COMES OUT HERE, ISN'T HE?

18 A YEAH. IF HE'S TO MAINTAIN A 2:1 SLOPE, YEAH.

19 Q MAYBE YOU CAN EXPLAIN TO ME WHY THIS IS ANY
20 FURTHER DISTANCE TO GO 300 FEET HERE THAN IT IS TO GO 300
21 FEET HERE TO ACCOUNT FOR 150 FOOT DEPTH.

22 A WELL, IT'S MUCH MORE THAN JUST THE DISTANCE.
23 THE FACT IS THAT A LOT OF THIS FILL HAD TO BE BROUGHT DOWN
24 IN HERE OVER THIS ROAD, OVER A HAUL ROAD. YOU HAD LOADING
25 AND HAULING OPERATIONS WHERE THE CONTRACTOR EXPECTED TO

1 HAVE DOZING OPERATIONS UP IN HERE. ONE MAN, ONE MACHINE.

2 Q OKAY. I'LL REPRESENT TO YOU THAT THIS MATERIAL
3 HERE ON THE FACE OF THIS REPRESENTS APPROXIMATELY 20,000
4 YARDS OF MATERIAL THAT WAS PUSHED OUT OF THIS DAYLIGHT AREA
5 AND PUSHED OVER THE BANK.

6 A WELL, IF YOU SAY SO.

7 Q THEN HE CUT A ROAD DOWN THROUGH IT AND NOW HE'S
8 COMING BACK IN AND HE IS CUTTING IT OUT AND PLACING IT AND
9 COMPACTING IT. SO HOW DOES THAT DIFFER FROM WHAT HE PLANNED
10 TO DO OVER HERE?

11 A WELL, I THINK YOU'VE GOT A LOT OF VOLUME DOWN
12 IN HERE THAT COULD BE FILLED UP WITH THIS MATERIAL BEING
13 PUSHED OVER. PUSHING IT THIS WAY HE DOES HAVE TO HANDLE
14 IT TWICE. HE'S GOT TO PUSH IT ALONG THIS WAY RATHER THAN
15 THE SHORTER DISTANCE THIS WAY. PUSH OR HAUL OR HE'S GOT
16 TO HAUL IT DOWN THIS SLOPE ONE PLACE OR THE OTHER.

17 Q BUT IF HE PUSHES IT DOWN HERE HE'S GOT TO PICK
18 IT UP AND MOVE IT AND PLACE IT. HE'S GOT TO HANDLE IT TWICE
19 ANYWAY.

20 A WHY? ISN'T THIS THE DESIGNATED WASTE AREA?

21 Q BUT IT HAS A COMPACTION REQUIREMENT.

22 A OKAY. THEN--

23 Q IT HAS TO BE PLACED AND COMPACTED.

24 A THAT'S WHY HE FIGURED A D7 DOZER. WELL, ACTUALLY,
25 HE TOLD ME HE FIGURED SOMETHING LESS THAN THE D7 DOZER DOWN

1 THERE TO HANDLE THE MATERIAL.

2 Q BUT MY POINT IS, IF HE IS GOING TO CONSTRUCT
3 THIS SLOPE, A FILL IN HERE WITH THE SLOPE, 2:1 SLOPE, THEN
4 HE'S GOING TO HAVE TO PUSH THIS MATERIAL FROM HERE 200 FEET
5 OR 300 FEET OUT HERE TO THE TOE OF THAT SLOPE, ISN'T HE?

6 A WELL, HE MAY HAVE TO PUSH SOME OF IT BUT NOT
7 ALL OF IT. WE ARE NOT TALKING ABOUT HAVING TO HAUL IT ALL
8 OUT TO THE POINT TOE OF THAT SLOPE. AND AGAIN, THERE'S
9 NO STATIONING ON THIS SO IT'S A LITTLE HARD TO BE EXACTLY
10 ON IT, BUT HE HAD TO HAUL ALL OF THIS DOWN IN HERE. USING
11 HAUL TRUCKS.

12 Q EXCEPT FOR THE 20,000 YARDS HE PUSHED DOWN THERE.

13 A TRUE.

14 Q NOW, YOU'LL NOTE HE'S GOT A ROAD HERE AND THERE
15 WAS NOTHING THAT PREVENTED HIM FROM CUTTING A ROAD ALONG
16 THAT FILL AT ANY TIME, WAS THERE--

17 A ACCESS--

18 Q --FOR ACCESS PURPOSES?

19 A AS I UNDERSTAND IT HE DID CUT A ROAD ALONG THE
20 SLOPE FARTHER DOWN LATER ON.

21 Q ISN'T IT TRUE, MR. GARDNER, THAT YOUR FIGURES
22 ARE BASED ON THE ASSUMPTION THAT THINGS CHANGED, THAT THEY
23 COULDN'T DOZE THE MATERIAL, THIS 200 FEET OR 300 FEET THAT
24 YOU SHOT, HE COULDN'T DO THAT BECAUSE INSTEAD OF PUSHING
25 IT TO THE SOUTH IN A FILL, WHICH HAS A 2:1 SLOPE, HE HAS

1 TO PUSH IT TO THE EAST IN A 2:1 SLOPE.

2 NOW, MY QUESTION IS, WHAT'S CHANGED?

3 A WELL, THE THING THAT'S CHANGED IS THAT--YOU SAY
4 200 FEET DOWN HERE TO 300 FEET DOWN HERE, TO 2:1 SLOPE,
5 BUT ALL THAT MATERIAL HAS TO BE PUSHED THAT FAR OUT. IF
6 HE PUSHES IT OVER HERE GRAVITY TAKES OVER FOR ONE THING
7 AND MOVES THAT MATERIAL DOWNHILL, HE CAN THEN COMPACT IT
8 IN PLACE. HERE, HE'S GOT TO PICK IT UP, LOAD IT, HAUL IT
9 DOWN HERE, DOWN HERE, SOMEWHERE, BUT HE HAS TO HAUL IT.
10 THEN HE'S FIGHTING GRAVITY ALL THE WAY WHEN HE'S ON WHEELS.

11 Q WHY CAN'T HE PUSH IT OVER HERE?

12 A BECAUSE HE COULD COME TOO FAR OVER TO BE EFFEC-
13 TIVE. HE CAN GET SOME OF IT HERE, WHICH HE DID. HE PUSHED
14 20,000 YARDS OVER IT TO BUILD HIS HAUL SLOPES BUT THEN HE'S
15 GOT TO PUSH IT FARTHER, HE'S GOT TO PUSH IT ACROSS AN
16 INCREASING AMOUNT OF GROUND BEFORE HE STARTS GRAVITY WORKING
17 FOR HIM.

18 Q SO WHAT DISTANCE DO YOU SAY IS EFFECTIVE TO PUSH
19 MATERIAL WITH A DOZER?

20 A IT DEPENDS ON THE SLOPE.

21 Q ALL RIGHT. GIVE ME THE BEST SHOT.

22 A WELL, IT DEPENDS ON THE SLOPE; IT DEPENDS ON
23 THE MATERIAL. I HAVE MADE THE ASSUMPTION ON HERE, AND I
24 THINK THAT IT'S REASONABLE, THAT A 350 FOOT AVERAGE DOZING
25 DISTANCE IS EFFECTIVE. I HAVE TO SAY THAT I WOULD CONSIDER

1 GOING FARTHER THAN THAT. I DON'T KNOW THAT I'D DO IT BUT
2 I WOULD CONSIDER IT. IF I GOT OUT THERE ON THE PROJECT
3 I THINK 350 FEET AVERAGE PUSH DISTANCE IS SOMETHING REASON-
4 ABLE TO ASSUME IN BIDDING. THAT IF I GOT OUT THERE AND
5 I FOUND THAT MY DOZING WAS MORE EFFECTIVE THAN THAT, I MEAN,
6 MY AVERAGE COST WOULD CERTAINLY GO UP FROM .81 CENTS A CUBIC
7 YARD, BUT IF I COULD I'D DOZE MORE.

8 Q WHAT DISTANCE DID YOU FIGURE TO COME UP WITH
9 .81 CENTS A YARD?

10 A 350 FEET.

11 Q 350 FEET. OKAY. DO YOU REMEMBER--DID YOU GO
12 DOWN AND LOOK AT THIS PROJECT BEFORE YOUR COMPANY BID IT?

13 A NO. ONE OF MY ESTIMATORS DID.

14 Q DID YOU DISCUSS THINGS WITH YOUR ESTIMATOR?

15 A YES, I DID. AFTER HE PUT HIS PRICE TOGETHER
16 I DISCUSSED IT WITH HIM.

17 Q DID YOU DISCUSS--DID HE ACCOMPANY--WAS HE ACCOM-
18 PANIED TO THE SITE, ANY SITE VISIT BY THE ENGINEER?

19 A I BELIEVE HE WAS. I BELIEVE HE WAS DOWN THERE--
20 I DON'T KNOW IF HE WAS DOWN THERE AT THE SAME TIME AS PRO-
21 CON'S PEOPLE OR NOT.

22 Q DID HE SAY ANYTHING TO YOU ABOUT THE SLOPES IN
23 THE EXISTING CUT, THE SLIVER CUT AREA?

24 A NOT THAT I RECALL.

25 Q DID HE TELL YOU WHAT THE--HE DIDN'T TELL YOU

1 WHAT THE ANGLE OF THE SLOPE WAS AS IT EXISTED?

2 A WELL, IT'S A LITTLE HARD TO PICK THAT OUT. I
3 KNOW FROM MORE RECENT DISCUSSIONS THAT THE EXISTING SLOPES
4 DOWN HERE ARE 1:1.

5 Q OKAY.

6 A SO IT'S WHAT, FIVE, SIX YEARS AGO? IT'S A LITTLE
7 HARD TO REMEMBER WHAT HE TOLD ME THEN AS OPPOSED TO FINDING
8 OUT OR HAVING IT RE-ENFORCED MORE RECENTLY.

9 Q DID HE SAY ANYTHING ABOUT WHAT THE ENGINEER TOLD
10 HIM ABOUT THE SLOPES AND WHAT THEY WOULD BE TAKEN OUT AT?

11 A NO.

12 Q DID HE TELL YOU WHETHER THE SLOPE'S STAKES WERE
13 IN PLACE IN THE CUT?

14 A NO.

15 Q WOULD YOUR BID INFORMATION HAVE REVEALED THAT?

16 A IT MAY HAVE.

17 Q LET ME REPRESENT TO YOU THAT THE STAKES WERE
18 IN PLACE, THE RECORD SHOW THEY WERE IN PLACE AT THE TIME.
19 DO YOU KNOW WHAT TIME HE WENT DOWN THERE, WHAT DAY HE WOULD
20 HAVE MADE THE VISIT?

21 A I DON'T KNOW THE DATE BUT IT WOULD HAVE BEEN
22 PRIOR TO THE BID. PROBABLY A WEEK, WEEK AND A HALF, TWO
23 WEEKS. SOMEWHERE IN THAT RANGE. NOT A GREAT DEAL OF TIME.

24 JUDGE YOUNG: AS AN ENGINEER, MR. GARDNER, IS
25 IT APPARENT TO AN ESTIMATOR AND SOMEONE ON A SITE OR SOMEONE

1 WITH YOUR EXPERTISE, WHEN YOU LOOK AT PLACED STAKES, CAN
2 YOU LOOK AT THEM AND SAY, WELL, THESE ARE 1/2:1 AND THESE
3 ARE 1:1 AND THAT'S SOMETHING THAT IS QUITE OBVIOUS TO YOU?

4 THE WITNESS: WELL, IT'S SOMETHING THAT YOU COULD
5 PICK UP IF YOU WERE ALERTED TO IT, BUT TO WALK OUT AND SEE
6 THE STAKES IN PLACE, NO. I MEAN, THAT'S QUITE A STEEP HILL.
7 YOU WOULDN'T WALK UP AND PACE IT OFF AND SAY, GEE, THIS
8 LOOKS FUNNY, UNLESS YOU WERE ALERTED TO THE FACT AND WERE
9 LOOKING FOR IT.

10 JUDGE YOUNG: SO UNLESS SOMEONE SAID IT TO YOU
11 YOU WOULD RELY ON WHAT WAS IN THE PLANS AND SPECIFICATIONS
12 AS TO THE SLOPE.

13 THE WITNESS: WELL, IF IT WAS BROUGHT UP TO ME
14 I WOULD ASK A QUESTION BUT I THINK YOU STILL HAVE TO RELY
15 ON THE PLANS AND SPECIFICATIONS. THAT'S WHAT YOU PUT YOUR
16 NAME TO.

17 JUDGE YOUNG: OKAY.

18 Q (BY MR. FORD) NOW, IF THE PLANS CALLED FOR 1/2:1
19 AND YOU BID IT 1/2:1 AND THEN THE ENGINEER TELLS YOU HE
20 IS GOING TO HAVE TO TAKE IT OUT ON THE 1:1, WHAT DO YOU
21 TELL THE ENGINEER THEN?

22 A I TELL HIM THAT THERE'S A COST TO CLAIM, THAT
23 IT'S GOING TO COST MORE TO DO IT THAT WAY.

24 Q YOU'RE GOING TO TAKE OUT MORE MATERIAL, GOING
25 TO GET PAID UNIT PRICE FOR IT, YOU STILL GOING TO REQUIRE

1 SOMETHING IN ADDITION TO THAT?

2 A OH, YES. YES.

3 Q ISN'T IT A FACT, MR. GARDNER, YOU'RE AN EXPER-
4 IENCED CONTRACTOR--ISN'T IT A FACT A 1:1 SLOPE'S EASIER
5 TO TAKE OUT THAN A 1/2:1 IN MATERIAL LIKE THAT?

6 A WELL, IN SOME CONDITIONS IT MAY BE BUT NOT IN
7 THIS CONDITION. I MEAN, YOU'RE TALKING ABOUT A SLIVER CUT.

8 Q OKAY. WHY DO YOU SAY THAT?

9 A WELL, BECAUSE, AS YOU TAKE OUT THAT 1:1 SLOPE--
10 IF I MAY REFER AGAIN TO THIS SHEET? 9-P IS THE ONE. YOU'RE
11 WORKING UP HERE WITH VERY SMALL, RELATIVELY SMALL QUANTITIES
12 OF MATERIAL. YOU'RE COVERING A LARGE AREA IN RELATIONSHIP
13 TO THE QUANTITY OF VOLUME OF MATERIAL THAT YOU'RE REMOVING.

14 Q NOW, DO YOU TRADITIONALLY TAKE THAT OUT OR HOW
15 WOULD YOUR COMPANY HAVE TAKEN IT OUT?

16 A I'D HAVE USED A HYDRAULIC EXCAVATOR. I'VE PUT
17 IT IN THREE TIERS SO THAT I COULD REACH THIS, PUT IT IN
18 THE TRUCK.

19 NOW, 45-P I'D HAVE A RELATIVELY FLAT LOAD FOR
20 THE TRUCKS SO HE WOULDN'T HAVE TO LABOR UP AND DOWN A STEEP
21 SLOPE, BUT HE COULD HAVE WITH THREE TIERS, AT THE MOST,
22 REACHED THE TOP OF THIS AND REACHED THE TRUCK AND WORKED
23 BACK IN.

24 NOW, YOU SAY, ISN'T A 1:1 EASIER. SEE, YOU GET
25 BEYOND THIS AREA WHERE THE MASS OR THE VOLUME OF SOIL BEING

1 REMOVED IS VERY LARGE IN RELATIONSHIP TO THE AREA BEING
2 GRADED HERE. THAT'S WHEN YOUR IMPLICATION OR YOUR STATE-
3 MENT THAT 1:1 IS EASIER TO REMOVE THAN A 1/2:1 OCCURS.
4 AND THAT'S WHY IN MY COST ANALYSIS I ONLY WENT UP TO STATION
5 561+50. BEYOND THAT, I SAID, IT REALLY DOESN'T MATTER A
6 LOT. IT BECOMES THE KIND OF A SITUATION YOU'RE TALKING
7 ABOUT. BUT YOU HAVE TO RECOGNIZE THAT YOUR COSTS ARE GOING
8 TO BE MUCH GREATER PER UNIT VOLUME, REMOVED, WHEN YOU'RE
9 WORKING IN THIS KIND OF A CONDITION.

10 NOW, 9-P WHERE YOU HAVE THESE LONG, THIN CUTS
11 YOU HAVE GOT TO GO WAY UP HIGH IN THE MOUNTAIN TO GET A
12 LITTLE BIT BETTER DIRT.

13 JUDGE YOUNG: SO OUR RECORD IS CLEAR, YOU ARE
14 REFERRING NOW TO 9-P.

15 THE WITNESS: THAT IS 9-P, YES.

16 JUDGE YOUNG: THAT'S 857+50, ON THE UPPER LEFT.

17 THE WITNESS: YES, 857+50.

18 JUDGE YOUNG: WILL YOU NOW SHOW ME THE OTHER
19 EXHIBIT TO WHICH YOU WERE JUST PREVIOUSLY REFERRING AND
20 LET'S IDENTIFY THAT.

21 THE WITNESS: THAT'S 45-P.

22 JUDGE YOUNG: AND 45-P IS AT THE 859 TO 860+50.

23 THE WITNESS: YES, IT IS.

24 JUDGE YOUNG: THANK YOU. AND IT IS THE SECOND--
25 DID YOU SAY 45-P, TO WHICH YOU ARE REFERRING, WHERE THE

1 COST OF 1/2:1 AND 1:1 WOULD BE SUBSTANTIALLY COMPARABLE?

2 THE WITNESS: NO, I THINK I STILL WOULD CONSIDER
3 THIS TO BE A CASE WHERE THERE WAS A DIFFERENCE. THERE ARE
4 SOME OTHER SHEETS, OTHER EXHIBITS, I SUPPOSE THEY'VE EVEN
5 BEEN ENTERED AS EXHIBITS, WHICH SHOW A MUCH, EVEN LARGER
6 MASS OF MATERIAL TO BE REMOVED AT THE 1:1.

7 JUDGE YOUNG: ALL RIGHT. WELL, IN ANY EVENT,
8 I THINK YOU MADE YOUR POINT. THANK YOU.

9 Q (BY MR. FORD) DID YOU CONSIDER USING SCRAPERS
10 TO MOVE THE MATERIAL?

11 A DID I OR WOULD I?

12 Q WELL, DID YOU?

13 A DID I? NO.

14 Q WOULD YOU?

15 A NO.

16 Q DO YOU HAVE SCRAPERS IN YOUR ORGANIZATION?

17 A NO.

18 Q THAT'S THE REASON THEN, RIGHT?

19 A THAT'S CORRECT.

20 Q YOU WOULD EXPECT THAT OTHER CONTRACTORS MAY ELECT
21 TO MOVE IT WITH SCRAPERS?

22 A IF A CONTRACTOR HAD A SCRAPER I WOULD EXPECT
23 HIM TO BE LOOKING FOR WORK FOR THAT SCRAPER, AND IF IT MIGHT
24 FIT THIS I WOULD EXPECT HIM TO BID IT USING THE SCRAPER.

25 Q ON A 1:1 SLOPE YOU'RE UP THE SLOPE CONSIDERABLY

1 SO YOU HAVE TO GO UP AND PIONEER A ROAD, DON'T YOU? YOU
2 HAVE TO START YOUR CUT WITH A CAT. IS THAT THE WAY YOU'VE
3 TRADITIONALLY DONE IT?

4 A WELL, YEAH, THAT'S WHAT YOU WOULD PIONEER--CALL
5 IT.

6 Q YOU MIGHT? PROCON WENT UP THERE WITH A BACKHOE
7 AFTER THEY CUT A ROAD UP THERE AND TOOK IT OUT WITH A
8 BACKHOE.

9 A MM-HMM. (YES).

10 Q YOU SAY THAT'S REASONABLE?

11 A OH, YES.

12 Q MR. GARDNER, IF YOUR ESTIMATOR WENT ON THE SITE
13 AND THE STAKES WERE IN THE GROUND THE DAY HE WENT THERE
14 WOULD YOU EXPECT HIM TO OBSERVE THAT IN THE CUT SECTION?

15 A TO NOTICE WHETHER THE STAKES WERE THERE?

16 Q MM-HMM. (YES).

17 A YES.

18 Q SO THAT WOULD CERTAINLY--IT MAY NOT ALERT HIM
19 TO THE CHANGE BETWEEN 1/2:1 AND 1:1 BUT IT CERTAINLY WOULD
20 ALERT HIM AS TO THE HEIGHT OF THE CUT, WOULDN'T IT?

21 A IF HE NOTICED 'EM. I MEAN, UP THAT SLOPE THAT
22 FAR YOU'RE NOT GOING TO BE ABLE TO SEE A LOT.

23 Q GENERALLY, WHEN THEY FIRST PUT 'EM IN THEY PUT
24 A NICE LITTLE FLAG AROUND 'EM, DON'T THEY?

25 A MM-HMM. (YES).

1 MR. FORD: WELL, YOUR HONOR, I DON'T THINK THAT
2 HIS EXHIBIT IS FOUNDED ON THE DIFFERENCE BETWEEN AS BID
3 AND ANYTHING REMOTELY CONNECTED WITH ACTUAL. I THINK IT'S
4 REMOTE AND SPECULATIVE AND I WOULD OBJECT TO IT COMING IN.

5 JUDGE YOUNG: ALL RIGHT. THE OBJECTION IS OVER-
6 RULED. 61-P IS RECEIVED.

7 (WHEREUPON, PLAINTIFF'S EXHIBIT
8 NO. 61 WAS PREVIOUSLY OFFERED
9 AND NOW RECEIVED INTO EVIDENCE).

10 JUDGE YOUNG: ANY FURTHER QUESTIONS OF THIS WIT-
11 NESS?

12 MR. BABCOCK: I JUST NEED ONE.

13
14 REDIRECT EXAMINATION

15 BY MR. BABCOCK:

16 Q YOU WERE ASKED A QUESTION OF WHETHER THE ANALYSIS
17 WAS ONE OF REVIEWING COST RECORDS OR IF YOU MAKE AN ESTIMATE
18 OR AN ANALYSIS IN THAT FASHION. IS IT FEASIBLE WITH THE
19 EQUIPMENT FLEET AND EQUIPMENT OPERATION DOING WHAT'S GOING
20 ON HERE TO SIMPLY GO INTO THE COST RECORDS AND DETERMINE
21 COST BY JUST LOOKING AT INVOICES AS TO WHAT WAS--WHAT IT
22 COST TO DO CERTAIN PORTIONS OF THE WORK?

23 A WELL, IT WOULD BE NICE IF IT WERE. IT WOULD
24 SIMPLIFY EVERYTHING. BUT NO. IF THE COSTS WERE KEPT IN
25 SUCH A WAY THAT YOU COULD SAY THIS IS--THIS LOAD WENT DOWN

1 HERE TO THE EMBANKMENT, THIS LOAD WENT OVER HERE TO THE
2 WASTE, THAT'D BE VERY NICE, BUT REALITY IS NOT THAT WAY.
3 ONE LOAD GOES DOWN AND ONE DRIVER THINKS HE'S GOING TO PUT
4 IT IN WASTE. HOW DO YOU SEPARATE WASTE FROM EMBANKMENT WHEN
5 THEY GO IN THE SAME PLACE? AND THEN ONE TRUCK GOES IN THIS
6 AREA AND ANOTHER TRUCK GOES OVER HERE. IT'S JUST TOO CON-
7 FUSING. THE COST RECORDS CANNOT BE KEPT THAT WAY. THAT'S
8 THE REASON THAT I HAVE GONE IN AND I SAID, OKAY, I KNOW
9 THAT THESE TRUCKS WERE USED, THIS LOADER, AND SUCH, THERE
10 MAY HAVE BEEN SOME INEFFICIENCIES THAT MR. FORD POINTED
11 OUT, BUT YOU HAVE TO SAY A REASONABLE EXPECTATION, USING
12 THIS EQUIPMENT TO ACCOMPLISH THIS TASK IS THIS MUCH. DOES
13 THAT SQUARE WITH WHAT REALLY HAPPENED?

14 NOW, FROM WHAT I UNDERSTAND, THE COST CALCULATION
15 THAT I'VE PUT TOGETHER HERE IS DRASTICALLY LESS THAN PROCON'S
16 ACTUAL COSTS OF PERFORMING THE WORK, OF ACCOMPLISHING THE
17 JOB. SO TO SAY THAT IT'S SPECULATION, YES, IT'S NOT FOUNDED
18 ON EXACT COST RECORDS, BUT IT DOES FIT WITHIN THE ENVELOPE
19 OF WHAT REALLY HAPPENED. AND I THINK--I THINK THAT IT'S
20 CONSERVATIVE GIVEN THE CONSERVATIVE COST PER EQUIPMENT HOUR.
21 I'VE MADE SOME CONSERVATIVE ASSUMPTIONS IN HERE SO THAT
22 I'D HAVE SOMETHING THAT WAS BELIEVABLE AND NOT CRAZY. SO
23 THAT'S THE ONLY WAY I CAN SEE THAT YOU CAN REALLY ASSESS
24 WHAT THE IMPACT OF THE CHANGES WOULD BE.

25 MR. BABCOCK: THANK YOU.

Tab 13

1 JUDGE YOUNG: AND THAT TAKES US BACK TO--LET'S
2 LOOK AT 6-P, 7-P, AND 18-P. WILL YOU BE SURE, COUNSEL,
3 WILL YOU CHECK TO SEE THAT ALL EXHIBITS ARE, THAT HAVE BEEN
4 MARKED ARE WITH THE CLERK AT THE CLERK'S DESK?

5 MR. BABCOCK: 6 IS THE DRAWING THAT I'D LIKE
6 ADMITTED BUT WE PROBABLY OUGHT TO COLOR THESE IN INSTEAD
7 OF HAVING TAPE ON IT SO THERE'S NO CHANCE OF GETTING LOST.

8 JUDGE YOUNG: 6-P THEN IS PAGE 5 OF THE PLANS;
9 IS THAT CORRECT?

10 MR. BABCOCK: THAT'S CORRECT.

11 JUDGE YOUNG: BLOWN UP.

12 MR. BABCOCK: YES.

13 JUDGE YOUNG: AND YOU DESIRE TO HAVE THAT MODI-
14 FIED, TO HAVE PLACED IN IT THE BLUE AND YELLOW PORTIONS
15 SHOWING THE ORIGINAL WASTE AREA AND THEN THE ACTUAL WASTE
16 AREA.

17 MR. BABCOCK: AS STATED, THE YELLOW WOULD BE
18 AS--

19 JUDGE YOUNG: SO THE YELLOW IS NOT THE ACTUAL--
20 THAT MAY NOT EVEN BE PLACED WITH THE 267.

21 MR. BABCOCK: THAT'S RIGHT. IN OTHER WORDS,
22 YOU SEE THIS IS THE--WELL--

23 JUDGE YOUNG: DO YOU HAVE ANY OBJECTION TO THAT?

24 MR. FORD: NO. THERE'S BEEN ENOUGH TESTIMONY
25 ON IT. I THINK IT'S IN.

1 JUDGE YOUNG: AND MY FEELING ABOUT IT IS THAT
2 I'M NOT SO SURE WE NEED TO RECEIVE THAT PARTICULAR EXHIBIT
3 BECAUSE IN 5--WELL, ON PAGE 5 OF 2-P, CERTAINLY FROM MY
4 WORKING COPY, I'VE PLACED WHERE YOU HAVE THOSE DRAFTS.
5 MY PREFERENCE WOULD BE FOR YOU TO TAKE THAT OFF AND FOR
6 YOU TO AGREE BETWEEN YOU TO COLOR THEM ONE IN BLUE, ONE
7 IN YELLOW, WHATEVER, SO THEY ARE JUST THERE, AND PUT AN
8 "A" AND A "B" AND THEN A LEGEND AT THE BOTTOM THAT "A"
9 IS THE PROXIMATE AREA OF THE ORIGINAL WASTE SITE AND "B"
10 IS THE STAKED AREA OF THE WASTE SITE. DO YOU HAVE ANY OBJEC-
11 TION TO THAT?

12 MR. FORD: NOPE.

13 JUDGE YOUNG: WITH THAT MODIFICATION 6-P THEN
14 IS RECEIVED.

15 (WHEREUPON, PLAINTIFF'S EXHIBIT
16 NO. 6 WAS OFFERED AND RECEIVED
17 INTO EVIDENCE).

18 JUDGE YOUNG: I WAS LOOKING AT 18. WHAT IS 18-P?

19 MR. FORD: THAT'S THE LETTER THAT U.D.O.T. DOES
20 NOT HAVE A COPY OF IN THEIR FILES THAT WAS SENT BY MR. FILL-
21 MORE, ALLEGEDLY.

22 JUDGE YOUNG: ALL RIGHT. THE TESTIMONY WAS THAT
23 MR. DIDERICKSEN STATED THAT THAT LETTER WAS IN HIS FILE,
24 AND IN HIS RECORDS KEPT BY THE CORPORATION, AND THAT WAS
25 THE FOUNDATION THAT YOU LAID FOR THAT.

1 MR. BABCOCK: THAT IS CORRECT.

2 JUDGE YOUNG: I'LL OVERRULE THE OBJECTION OF
3 THE DEFENDANT. THAT WILL BE RECEIVED.

4 (WHEREUPON, PLAINTIFF'S EXHIBIT
5 NO. 18 WAS OFFERED AND RECEIVED
6 INTO EVIDENCE).

7 JUDGE YOUNG: NOW, WHAT ABOUT 7-P?

8 MR. FORD: WITHDRAWN?

9 MR. BABCOCK: YEAH.

10 (WHEREUPON, PLAINTIFF'S EXHIBIT
11 NO. 7 WAS WITHDRAWN FROM
12 EVIDENCE).

13 JUDGE YOUNG: THAT TAKES CARE THEN OF ALL OF
14 THE EXHIBITS. THEY'VE EITHER BEEN RECEIVED OR WITHDRAWN.
15 NOW, DO YOU REST?

16 MR. BABCOCK: I WANTED TO INTRODUCE AN ACTUAL
17 SUMMARY OF THE BLASTING COSTS BUT I COULD DO THAT ON
18 REBUTTAL.

19 JUDGE YOUNG: DO YOU HAVE ANY OBJECTION? HAVE
20 YOU REVIEWED THE BLASTING COSTS HE HAS INCURRED?

21 MR. FORD: I DON'T THINK I HAVE.

22 JUDGE YOUNG: WOULD YOU TAKE A MOMENT AND REVIEW
23 THAT AND SEE IF YOU HAVE ANY OBJECTION TO RECEIVING THAT?
24 DO YOU HAVE AN EXHIBIT THAT YOU WOULD PROPOSE?

25 MR. BABCOCK: YEAH. ACTUALLY, I'D LIKE TO COPY

1 IT.

2 MR. FORD: YOUR HONOR, WE'RE GETTING INTO A TOTAL
3 COST SITUATION HERE.

4 JUDGE YOUNG: I WILL NOT ALLOW, CERTAINLY, FOR
5 THE PURPOSE OF THE DECISION, THE TOTAL COST BASIS TO BE
6 THE BASIS OF THE CASE LAW, WILL NOT ALLOW THAT TO BE PART
7 OF MY DECISION.

8 HOWEVER, ISN'T THERE A RELEVANCE AS TO WHAT HE
9 ENCOUNTERED ASSOCIATED WITH THE BLASTING THAT WAS UNEXPECTED,
10 AND IF I DETERMINE THERE WAS A MODIFICATION OF THE AGREEMENT
11 IN THAT RESPECT WOULDN'T THAT GIVE ME SOME BASIS UPON WHICH
12 TO CONSIDER THE IMPACT?

13 MR. FORD: I HATE TO ADMIT THAT, YOUR HONOR.
14 YOU'RE PROBABLY RIGHT. I JUST--YOU KNOW--

15 JUDGE YOUNG: WHY DON'T WE ASK THE PROFFER, IF
16 MR. DIDERICKSEN WERE CALLED TO TESTIFY WHAT WOULD HE TESTIFY
17 TO AS TO THE AMOUNT HE INCURRED IN COSTS IN BLASTING.

18 MR. BABCOCK: HE ALREADY DID THAT.

19 JUDGE YOUNG: WELL THEN, THAT'S IN EVIDENCE.
20 I THOUGHT IT WAS \$117,000.00. IS THAT WHAT THE NUMBER IS
21 THAT WE HAVE?

22 MR. BABCOCK: 116, BUT HE DIDN'T INTRODUCE THE
23 BACK-UP, SO I THOUGHT, BECAUSE THERE'S BEEN SOME DEBATE,
24 HE'S ALREADY TESTIFIED WHAT THE NUMBER WAS BUT HE HAS
25 SUMMARIES OF HOW THAT WAS DETERMINED.

Tab 14

1 JAMES D. DIDERICKSEN,
2 RECALLED AS A WITNESS BY AND ON BEHALF OF THE DEFENDANT,
3 HAVING BEEN PREVIOUSLY DULY SWORN, WAS EXAMINED AND TESTI-
4 FIED FURTHER AS FOLLOWS:

5
6 JUDGE YOUNG: MR. DIDERICKSEN, IF YOU'LL TAKE
7 THE STAND AND RECALL THAT YOU ARE STILL UNDER OATH.

8
9 DIRECT EXAMINATION

10 BY MR. FORD:

11 Q MR. DIDERICKSEN, THE OTHER DAY WHEN I WAS CROSS-
12 EXAMINING YOU AND WE WERE DISCUSSING THE SLIVER FILL AREA,
13 I'M NOT SURE THAT I UNDERSTAND, SO I WANTED TO ASK YOU THE
14 QUESTION. IS IT YOUR CONTENTION THAT MR. KIRKHAM DID NOT
15 TELL YOU THAT YOU WOULD BE REQUIRED TO TAKE THE MATERIAL
16 OUT ON A 1:1 SLOPE IN THE SLIVER FILL AREA?

17 A IN THE SLIVER CUT AREA?

18 Q THE SLIVER CUT AREA.

19 A MY CONTENTION IS THAT I DON'T RECALL HIM SAYING
20 THAT. AND MY CONTENTION IS THAT MY NOTES SAY THAT HE DID
21 NOT. THAT I WROTE DOWN THAT THE EXISTING CUT WAS ON A 1:1.

22 MR. FORD: OKAY. YOUR HONOR, I MOVE TO PUBLISH
23 HIS DEPOSITION.

24 JUDGE YOUNG: I DON'T HAVE ANY OBJECTION TO THAT.
25 I WONDER IF WE NEED TO HAVE--DO YOU WANT THE DEPOSITION

1 TO BE RECEIVED AS AN EXHIBIT?

2 MR. FORD: YES.

3 JUDGE YOUNG: I GUESS WE CAN MARK 'EM. I DON'T
4 KNOW QUITE HOW WE DEAL WITH DEPOSITIONS ANY MORE. THEY
5 USED TO BE PART OF THE COURT'S FILE AND NOW COUNSEL RETAINS
6 THE DEPOSITIONS. WOULDN'T IT BE BETTER FOR OUR RECORD IF
7 YOU WERE TO ONLY OBTAIN THAT PORTION OF THE DEPOSITION THAT
8 YOU WISH TO HAVE?

9 MR. FORD: I'LL BE HAPPY TO DO THAT, YOUR HONOR.

10 JUDGE YOUNG: DO YOU HAVE ANY OBJECTION TO THAT
11 PROCEDURE?

12 MR. FORD: NO, I DON'T.

13 Q (BY MR. FORD) DO YOU RECALL WHEN YOUR DEPOSITION
14 WAS TAKEN ON THE 8TH OF DECEMBER, 1989?

15 A YES.

16 Q I WONDER IF YOU'D TURN TO PAGE 39. LET'S COME
17 BACK TO PAGE 38, LINE 19. I ASKED YOU THE QUESTION, "DO
18 YOU REMEMBER WHAT THE PLANS DESIGNATE?" YOUR ANSWER, "1/2:1,"
19 RIGHT?

20 A YES.

21 Q "QUESTION: OKAY. AND WHAT DID YOU ACTUALLY
22 REMOVE IT ON?

23 "ANSWER: I BELIEVE IT WAS 1 AND 1/2:1 OR 1:1.

24 "QUESTION: 1:1?

25 "ANSWER: I CAN'T REMEMBER EXACTLY."

1 THEN I SAID, "OKAY. I BELIEVE IT WAS 1:1."
2 AND THEN I SAID, "NOW, YOU WERE INFORMED THAT THE REMOVAL
3 WOULD BE ON A 1:1 AT THE TIME OF THE SITE VISIT, WEREN'T
4 YOU?"

5 AND YOUR ANSWER? WOULD YOU READ IT, PLEASE?

6 A YES. I SAID, "I THINK MR. KIRKHAM TOLD US THAT,
7 AND THEN WE WENT BACK, I THINK WE WERE ON THE 29TH. AND
8 MONDAY BEFORE THE BID WE THOUGHT HE WAS GOING TO ISSUE A
9 WRITTEN ADDENDUM. AND I BELIEVE LARRY FILLMORE AND MYSELF
10 CALLED TO SEE IF THERE WAS ANY CHANGES"--

11 JUDGE YOUNG: NOT TOO FAST.

12 THE WITNESS: "CALLED TO SEE IF THERE WAS ANY
13 CHANGES, IF THERE WAS ANY CHANGES IN THE JOB OR SHOULD WE
14 BID IT AS DRAWN. AND MR. KIRKHAM SAID, 'BID IT AS DRAWN.'
15 AND SO WE BID IT WITH A 1/2:1, IF I RECALL RIGHT. AND I'M
16 NOT AWARE OF ANY ADDENDUMS THAT ISSUED A CHANGE. THE
17 EXISTING SLOPE WAS WHAT"--EXCUSE ME, THAT'S YOUR QUESTION.

18 Q TURN TO PAGE 40. PLEASE REFER DOWN TO LINE 23.
19 MY QUESTION TO YOU THEN WAS, "NEVERTHELESS, YOU AGREE THAT
20 YOUR BID NOTES SAY"--AND READ WHAT THOSE TWO LINES SAY.

21 A "HE DID SAY THAT ON THE JOB TOUR. I REMEMBER
22 HIM SAYING THAT ON THE JOB TOUR. WHEN WE ASKED HIM, HE
23 SAID TO, BY SHOWING ON THE CENTERLINE THE STAKES, THE CUT
24 SLOPE, 1:1 ON THE TOP. APPROXIMATELY 200 FEET."

25 JUDGE YOUNG: LET ME STOP YOU FOR A MOMENT, MR.

1 DIDERICKSEN. SOMETIMES WHEN PEOPLE READ THEY SPEAK SOFTER
2 AND FASTER AND DO NOT ENUNCIATE CLEARLY. I HAVE TO HEAR
3 EVERYTHING YOU SAY, SO ALSO DOES THE REPORTER. SO DON'T
4 SPEED UP, USE THE SAME PACE, AND SAY CLEARLY WHAT YOUR
5 RESPONSES ARE.

6 Q (BY MR. FORD) LET'S START AGAIN AT YOUR RESPONSE.
7 READ LINES 24, 25--AND THEN YOU TURNED TWO PAGES. SO READ
8 THE FIRST LINE ON THE NEXT PAGE.

9 A ON WHICH PAGE, SIR?

10 Q STARTING WITH MY QUESTION AT LINE 23 ON PAGE
11 40. I SAID, "NEVERTHELESS, YOU AGREE THAT YOUR BID NOTES
12 SAY"--AND THEN YOUR ANSWER STARTS BEFORE I FINISHED THE
13 QUESTION. YOU CAN READ YOUR ANSWER.

14 A "YEAH, HE DID SAY THAT ON THE JOB TOUR. I
15 REMEMBER HIM SAYING THAT"--

16 JUDGE YOUNG: MR. DIDERICKSEN.

17 THE WITNESS: "I REMEMBER HIM SAYING THAT ON
18 THE JOB TOUR. WHEN WE ASKED HIM, HE SAID, TO BE SAFE, BID
19 IT AS DRAWN."

20 Q (BY MR. FORD) OKAY.

21 A MAY I EXPLAIN SOMETHING? I DIDN'T HAVE--

22 JUDGE YOUNG: THERE'S NO QUESTION PENDING. GO
23 AHEAD WITH YOUR NEXT QUESTION.

24 THE WITNESS: I'M SORRY.

25 Q (BY MR. FORD) NOW, YOU DO AGREE THAT THAT

1 TESTIMONY IS CONTRARY TO THE TESTIMONY THAT YOU GAVE HERE
2 IN COURT THE OTHER DAY AND HERE JUST A FEW MINUTES AGO?

3 A NO, I BELIEVE THAT HE DID SAY 1:1, AND WHEN I
4 WENT BACK THROUGH MY NOTES AND READ HOW I BID IT AND
5 REFRESHED MY MEMORY--AT THE TIME YOU WERE TAKING MY DEPO-
6 SITION, I HAD NOT REVIEWED MY NOTES AND YOU WERE HITTING
7 ME COLD. WHEN I REMEMBER HIM SAYING 1:1, AS I SAID, WHEN
8 I WENT BACK THROUGH THE NOTES AND DISCOVERED WHAT THE NOTES
9 SAID, TO ME, THEN IT WAS EXISTING SLOPE THAT I WAS NOTING
10 AND I SAID IN THERE THAT HE TALKED ABOUT THE EXISTING SLOPE
11 BUT I COULDN'T REMEMBER WHICH ONE WAS WHICH AND I WENT BACK
12 AND REFRESHED MY MEMORY ON THE NOTES.

13 Q WELL, I WOULD AGREE THAT YOUR NOTES LEAVE SOME
14 QUESTION, BUT YOUR TESTIMONY ON DECEMBER 9TH, DECEMBER 8TH
15 OF 1989, CERTAINLY ISN'T EQUIVOCAL.

16 A NO, IT SAID I REMEMBER HIM TALKING ABOUT THE
17 1:1. AND AS I SAID, I DIDN'T REVIEW MY NOTES BEFORE THE
18 DEPOSITION.

19 MR. FORD: THAT'S ALL THE QUESTIONS I HAVE, YOUR
20 HONOR. I'LL SUBSTITUTE THOSE PAGES.

21 JUDGE YOUNG: THANK YOU.

22 MR. DIDERICKSEN, YOU MAY STEP DOWN.

23 THE WITNESS: THANK YOU.

24 JUDGE YOUNG: ALL RIGHT. THE DEPOSITION IS PUB-
25 LISHED ONLY AS TO THOSE PAGES AND WE WILL RECEIVE AN EXHIBIT

1 FROM COUNSEL FOR THAT PORTION.

2 (WHEREUPON, DEFENDANT'S EXHIBIT
3 NO. 64 WAS OFFERED AND RECEIVED
4 INTO EVIDENCE).

5 MR. FORD: WE'D CALL HUGH KIRKHAM.
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Tab 15

1 A I WAS INVOLVED IN THE PROJECT WITH PRELIMINARY
2 INFORMATION ON IT PROBABLY SIX TO EIGHT MONTHS EARLIER BEFORE
3 THE PROJECT. THAT SPECIFIC ASSIGNMENT, I THINK, WAS ABOUT
4 TWO WEEKS THAT WE WOULD BE CONSTRUCTING IT.

5 Q WERE YOU ASKED TO PROVIDE DATA TO THE DESIGNERS?

6 A YES, I WAS.

7 Q WHAT SORT OF DATA DID YOU PROVIDE?

8 A CROSS SECTIONS OF THE EXISTING HIGHWAY AND UP
9 THE FILL SLOPES AND INTO THE WHOLE AREA ALONGSIDE THE FILL.

10 Q AND WHY WERE THOSE THINGS REQUESTED?

11 A THE DESIGNERS NEEDED THAT TO ESTABLISH WHAT SIZE
12 OF A PROJECT AND HOW THEY WERE GOING TO RE-ALIGN IT.

13 Q DID YOU MAKE ANY RECOMMENDATIONS TO THEM?

14 A NOT DURING THE SURVEYING PHASE, NO.

15 Q NOW, WERE YOU LATER INVOLVED IN THE PLANNING
16 OF THAT PROJECT AT ALL?

17 A NOT IN THE PLANNING, NO, SIR.

18 Q SO APPROXIMATELY TWO WEEKS BEFORE THE BID YOU
19 WERE GIVEN THE ASSIGNMENT TO BE THE ENGINEER; IS THAT RIGHT?

20 A YES, SIR.

21 Q THEN WHAT DID YOU DO AT THAT POINT?

22 A WE RECEIVED THE ASSIGNMENT AND THE PLANS, WE
23 WENT OUT WITH THE SURVEY CREW AND BEGAN TO SURVEY THE NEW
24 ALIGNMENT SHOWN ON THE PLANS AND TO DO THE SLOPE STAKING,
25 CROSS SECTIONING AND SLOPE STAKING.

1 Q EXPLAIN WHAT A SLOPE STAKE IS, OR WHAT SLOPE
2 STAKING IS.

3 A SLOPE STAKING IS THE PROCESS USED TO ESTABLISH
4 THE POINT WHERE THE CONTRACTOR WILL EITHER BEGIN HIS CUT
5 OR FILL, AND IT'S THE INTERSECTION OF THE TEMPLATE AS
6 DESIGNED, AND THE GROUND THAT EXISTS, AND A SERIES OF
7 MEASUREMENTS AND CALCULATIONS.

8 Q NOW, IS THAT INFORMATION RECORDED ANYWHERE?

9 A YES, IT IS.

10 Q WHAT DO YOU RECORD IT IN?

11 A THE SURVEY CREW WILL NORMALLY RECORD IT IN A
12 FIELD BOOK.

13 Q WHAT DATA IS RECORDED IN THE FIELD BOOK?

14 A THE DATA IN THE FIELD BOOK WOULD BE THE PARTY,
15 THE NAMES OF THE PARTIES THAT IS DOING THE WORK, THE DATES
16 THAT THE WORK IS BEING DONE, THE LOCATION OF THE WORK,
17 WEATHER CONDITIONS, AND THE MEASUREMENTS TAKEN BY THE SURVEY
18 CREW.

19 Q AT THE VARIOUS BREAK POINTS?

20 A YES.

21 Q AT THE CROSS SECTIONS?

22 A IN CROSS SECTIONING OR DESIGNATED STATIONS.

23 Q AND THEN IS ANYTHING PLACED IN THE GROUND AS
24 A RESULT OF THAT?

25 A AS THE WORK IS DONE THE SLOPE STAKES WILL BE

1 PLACED IN THE GROUND AT THAT TIME.

2 Q WHAT DO THEY LOOK LIKE?

3 A THEY'RE A STAKE, THE WOOD. THE ONE'S WE USE
4 ARE A WOOD MATERIAL ABOUT THREE-QUARTERS OF AN INCH THICK
5 BY TWO INCHES WIDE, ABOUT 15 INCHES TALL. AND ON THAT IS
6 WRITTEN THE STATION, ENGINEER STATION AT WHICH IT'S LOCATED
7 AND THEN THE CUT OR FILL, THE DEPTH OR THE HEIGHT--THE
8 DEPTH OF CUT OR HEIGHT OF FILL ALONG WITH THE SLOPE THAT
9 IS TO BE TAKEN OUT AND THE DISTANCE TO THE CENTERLINE OF
10 THE ROAD. AND ANY OFFSETS THAT THERE ARE FROM THE ACTUAL
11 POINT THAT THEY REPRESENT TO BE.

12 Q FROM THAT INFORMATION THE CONTRACTOR IS EXPECTED
13 TO FOLLOW THE INFORMATION RECORDED THERE AND CONSTRUCT THE
14 ROAD IN ACCORDANCE WITH THOSE STAKES; IS THAT RIGHT?

15 A YES, SIR.

16 Q AND HAVE YOU CHECKED THE SURVEY DATA RECENTLY
17 TO DETERMINE WHEN THE SLOPE STAKING WAS DONE IN THE CUT
18 SECTIONS?

19 A YES, I HAVE.

20 Q WHAT DATES WERE THOSE?

21 A THE DATES THEY STARTED DOING WORK ON THAT AREA
22 ON THE 23RD OF JANUARY, AND ADDITIONAL WORK ON THE 29TH
23 OF JANUARY THROUGH THE LARGE CUT AREA WAS COMPLETED THROUGH
24 THE 29TH, AND THEN ON THE 30TH AND THE 31ST THE DAYLIGHT
25 AREA WAS COMPLETED STAKING. THERE WERE NO STAKINGS DONE

1 IN THE FILL AREA UNTIL IN FEBRUARY.

2 Q OKAY. WHY IS THAT?

3 A I'M SORRY?

4 Q WHY DON'T YOU STAKE THE FILL AT THE SAME TIME
5 YOU STAKE THE CUT?

6 A IN THIS CASE--NORMALLY, YOU WOULD, BUT IN THIS
7 CASE BECAUSE OF THE WASTE SITUATION, WE NEEDED TO KNOW THE
8 VOLUME OF MATERIAL WE WERE GOING TO BE PLACING, IN ORDER
9 TO ESTABLISH THE AREA WE WOULD BE PLACING THE FILL IN, TO
10 BE SURE THAT ONCE WE STARTED THE FILL UP WE WOULDN'T HAVE
11 TO GO BACK AND TRY TO GO TO THE BOTTOM TO FIND ADDITIONAL
12 AREA TO PLACE IT.

13 Q WHERE WERE THOSE CALCULATIONS DONE?

14 A THE CALCULATIONS WERE DONE IN MY OFFICE IN
15 BLANDING.

16 Q UNDER YOUR DIRECTION?

17 A YES, SIR.

18 Q YOU DIDN'T SPECIFICALLY DO THEM?

19 A NO. I DIDN'T.

20 Q DO YOU HAVE PEOPLE TRAINED FOR THAT PURPOSE?

21 A YES, SIR, I DO.

22 Q NOW, WHEN THESE STAKES ARE PLACED IN THE GROUND
23 DO YOU PUT ANYTHING, DO YOU TIE ANY RIBBON ON THEM OR ANY-
24 THING LIKE THAT?

25 A YES, THERE'S A RIBBON TIED ON THEM AND A NAIL

1 SET ADJACENT TO THEM THAT REPRESENTS THE POINT THAT THE
2 SHOT, OR INFORMATION WAS TAKEN ON.

3 Q AND THE CONTRACTOR'S NOT SUPPOSED TO DISTURB
4 THOSE, IS HE?

5 A PREFERABLY NOT, NO, SIR.

6 Q NOW, FROM THAT SLOPE STAKE DATA HOW ELSE IS IT
7 USED? IS IT USED TO DETERMINE QUANTITIES?

8 A YES, IT IS.

9 Q EXPLAIN TO THE COURT HOW THAT WORKS.

10 A THE SLOPE STAKE DATA IS THE CROSS SECTIONAL OF
11 SURFACE THAT EXISTS OUT ON THE GROUND AND THAT IS PLOTTED,
12 AND THEN THE TEMPLATE OF THE ROADWAY DESIGN SECTION IS
13 APPLIED, DRAWN WITH THAT, AND THEN THE AREA IS CALCULATED
14 USING THE NUMERICAL INFORMATION WRITTEN DOWN, OR IN THE
15 BOXES, TO DETERMINE THE AREA OF THAT CUT OR FILL AT THAT
16 STATION, AND THEN THE ADJACENT STATIONS ARE AVERAGED WITH
17 THE VOLUME DETERMINED BETWEEN THE LENGTHS--OF THE LENGTHS
18 BETWEEN THEM.

19 Q AND IT'S UP TO THE CONTRACTOR THEN TO BUILD IT--
20 WHAT IF HE DOESN'T CUT THE SLOPES EXACTLY AS THEY'RE STAKED?
21 LET'S SUPPOSE HE LEAVES THEM FULL, THEN WHAT DO YOU DO?

22 A IF HE LEAVES THEM FULL WE GENERALLY HAVE TO GO
23 BACK AND REQUIRE THEM TO GO BACK AND BRING THEM DOWN A SECOND
24 TIME ON A CUT SLOPE IN ORDER TO DEVELOP THE MATERIAL
25 NECESSARY TO BALANCE OR USE IN THE JOB TO COMPLETE THE

1 PROJECT.

2 Q WHAT IF HE OVERCUTS? IS HE PAID FOR THAT?

3 A NO, HE'S NOT PAID FOR OVERCUT. AND THEN WE HAVE
4 THE PROBLEM OF DISPOSING OF THAT SURFACE MATERIAL.

5 Q NOW, WAS THERE ANY APPRECIABLE UNDERCUTTING OR
6 OVERCUTTING IN THIS PROJECT?

7 A NOT SIGNIFICANT.

8 Q AND THAT'S WHY THE QUANTITIES CAME OUT FAIRLY
9 CLOSE TO YOUR CALCULATION; IS THAT RIGHT?

10 A I BELIEVE SO, YES, SIR.

11 Q EXPLAIN, IF YOU WILL, WHY YOU DETERMINED THAT
12 THERE WAS--FIRST OF ALL, LET ME ASK YOU.

13 DID YOU DETERMINE THERE WAS GOING TO BE ADDITIONAL
14 MATERIAL FROM THE AMOUNT SPECIFIED IN THE PLANS?

15 A YES, WE DID.

16 Q EXPLAIN HOW MUCH.

17 A THE CALCULATIONS THAT WE DID DETERMINE THERE'D
18 BE APPROXIMATELY 20,000 YARDS PLUS OR MINUS ADDITIONAL.

19 Q DO YOU HAVE A QUICK EXPLANATION FOR WHY THAT
20 HAPPENED?

21 A I DON'T HAVE A SINGLE EXPLANATION FOR IT. IT
22 WAS, I THINK, A COMBINATION OF FACTORS INVOLVED. WE CHANGED
23 THE CUT SLOPE IN THE BIG CUT AREA AND THE QUANTITY ALSO
24 THAT WAS REMOVED IN A DAYLIGHT SECTION TO THE LEFT SIDE
25 OF THE HIGHWAY WAS ON THE SLITE, ON THE EXISTING SLITE,

1 AND THAT WAS A DIFFICULT QUANTITY TO DETERMINE EXACTLY IN
2 THE INITIAL PHASE.

3 Q AT WHAT POINT DID YOU DETERMINE THAT THERE WAS
4 GOING TO BE ADDITIONAL MATERIAL? WAS IT BEFORE THE BIDDING
5 OR AFTER?

6 A IT WAS AFTER THE BIDDING.

7 Q DO YOU REMEMBER HOW LONG AFTER?

8 A I'M NOT SURE. THE DETERMINATION WAS SOME TIME
9 IN FEBRUARY OR MARCH, BUT IT WAS AFTER THE BIDDING OF THE
10 PROJECT.

11 Q SHORTLY AFTER THE CONTRACTOR HAD BEEN AWARDED
12 THE PROJECT?

13 A YES.

14 Q AND DID YOU INFORM THE CONTRACTOR?

15 A YES, WE DID.

16 Q AND WAS THERE ANY RESPONSE--WHO DID YOU INFORM?
17 LET ME ASK YOU THAT.

18 A AS I RECALL WE INFORMED THE SUPERINTENDENT ON
19 THE PROJECT. AND I BELIEVE WE INFORMED LARRY FILLMORE.
20 WHO WAS PROJECT MANAGER.

21 Q AND DID THEY REGISTER ANY OBJECTION OR--

22 A NO, THERE WAS NO OBJECTION AT THAT TIME. THAT
23 WAS THE REASON WE QUESTIONED THEM IF THERE WOULD BE A PROBLEM
24 WITH THE EXTRA MATERIAL. AND THERE WAS NO PROBLEM WITH
25 IT BEING INDICATED AT THAT TIME.

1 Q THEY GET PAID FOR THAT, DON'T THEY?

2 A YES, SIR, THEY DO.

3 Q NOW, YOU INDICATED THAT ITS SLOPE ANGLE WAS
4 CHANGED. CAN YOU EXPLAIN WHAT HAPPENED AND WHY THAT DECISION
5 WAS MADE?

6 A THE SLOPE IN THE ORIGINAL 1/2:1 PINCHED OUT VERY
7 RAPIDLY ALL THE WAY UP THE EXISTING 1:1 CUT SLOPE. I'M
8 TRYING TO FIGURE OUT HOW TO SHOW THAT.

9 Q WOULD A PHOTOGRAPH HELP?

10 A OR THE CROSS SECTIONS MIGHT. CAN I USE EXHIBIT
11 9-P, IF THAT WOULD BE ALL RIGHT?

12 Q FINE. IF THAT'LL HELP EXPLAIN IT.

13 A THE 1/2:1 SLOPE--THE EXISTING SLOPE WAS APPROXI-
14 MATELY A 1:1. THE CUT SLOPE WITH A 1/2:1 CAUSED A BREAK
15 HERE WITH A SLIVER EXCAVATION ALL THE WAY THROUGH THE PRO-
16 JECT--OR THROUGH THE CUT AREA OF THE PROJECT. AND AS
17 MATERIAL WOULD SLOUGH ON THIS, AS HAS BEEN DESCRIBED BEFORE--
18 THIS IS DISTORTED. IT'S ACTUALLY MUCH STEEPER THAN THIS.
19 AS MATERIAL WOULD FALL OFF OF HERE THE 1/2:1 AREA WOULD
20 TEND TO CATAPULT MATERIAL TOWARD THE ROADWAY WHERE THE 1:1
21 SLOPE WOULD TEND TO HOLD IT AND BRING IT ALL ALL THE WAY
22 TO THE DITCH AT THE BOTTOM. SO WE DETERMINED THAT THE
23 NARROWNESS OF THE CUT, IN HAVING TO DO THIS TYPE OF AN EXCA-
24 VATION ALL THE WAY THROUGH, VERSUS, BY ESTABLISHING A 1:1,
25 WE HAD A UNIFORM SLOPE WITHOUT A BREAK, AND THEN IT ALSO

1 WIDENED OUT MUCH QUICKER AT THE TOP FOR ACCESS PURPOSES.
2 THIS WOULD BE SEEN, I THINK, ON THIS ONE. THIS IS STATION
3 859-860. IN THIS AREA IT WIDENED OUT MUCH QUICKER FOR
4 ACCESS. WE HAD THE NARROW EXCAVATION ALL THE WAY THROUGH.

5 Q NOW, THAT EXHIBIT YOU'RE REFERRING TO RIGHT NOW
6 IS WHAT?

7 A 45-P.

8 Q SO THAT WOULD--DO YOU HAVE AN OPINION AS TO
9 WHETHER THAT WOULD BE MORE DIFFICULT OR LESS DIFFICULT TO
10 EXCAVATE IN THAT, IN 45-P?

11 A ON 45-P IT WOULD BE EASIER BECAUSE YOU'VE ESTAB-
12 LISHED A WIDTH RIGHT AT THE TOP THAT YOU CAN GET ON IMME-
13 DIATELY WITH A PIECE OF EQUIPMENT.

14 Q NOW, AS FAR AS EXHIBIT 9-P, WOULD THAT BE THE
15 SAME CASE OR WOULD IT BE DIFFERENT?

16 A NO. IN 9-P, FOR THESE FIRST AREAS THROUGH HERE,
17 ACTUALLY MORE DIFFICULT BECAUSE OF THE LONG SLIVER CUT
18 THROUGH THAT SECTION. IT WOULD BE MORE DIFFICULT THERE
19 INITIALLY, BUT THE MAJORITY OF THE EXCAVATING WAS EASIER.

20 Q OKAY. WOULD THAT SHOW IN THIS PHOTOGRAPH? COULD
21 YOU MAYBE POINT OUT--MAYBE WE HAVE A BETTER ONE THAN THAT.
22 REFERRING YOU TO EXHIBIT 14-P, WHICH IS THE CUT AS IT LOOKED
23 AT THE BEGINNING OF THE PROJECT, COULD YOU POINT OUT MAYBE
24 WHERE THE DIFFICULT AREA WOULD BE AND WHERE THE LESS DIFFI-
25 CULT AREA WOULD BE?

1 A THE MORE DIFFICULT AREA WOULD BE FROM THE
2 BEGINNING OF THE PROJECT UP UNTIL WE DEVELOPED THIS FULL
3 HEIGHT OF THE CUT SECTION IN THIS AREA.

4 Q OKAY.

5 A I'M ESTIMATING 300 FEET DOWN INTO THE PROJECT,
6 MAYBE A LITTLE FURTHER THAN THAT.

7 Q AND YOU ADMIT THAT WOULD BE MORE DIFFICULT?

8 A YES, SIR, I DO.

9 Q YOU KNEW THAT WHEN YOU STAKED IT.

10 A YES, WE DID.

11 Q BUT AS YOU POINTED OUT, FROM THEREON IT BECOMES
12 LESS DIFFICULT.

13 A INSTEAD OF THE CUT SLOPE ENDING IN THIS FACE,
14 ALL THE WAY THROUGH THE CUT SLOPE, IT WENT OVER THE TOP,
15 AND THEY HAD ACCESS UP THAT RIDGE INTO THIS AREA.

16 Q AND I BELIEVE THIS PHOTOGRAPH--THIS PHOTOGRAPH
17 IS DATED, OR TAKEN ON THE 22ND OF APRIL. IT'S EXHIBIT
18 30-D. IS THIS WHAT YOU MEAN WITH THIS ACCESS ROAD GOING
19 UP HERE WHERE THIS PIECE OF EQUIPMENT IS WORKING AT THE
20 TOP?

21 A YES, SIR, RIGHT UP THROUGH THAT AREA.

22 Q IF YOU HADN'T MADE THE SLOPE CHANGE THIS WOULD
23 NOT HAVE BEEN IN THE--

24 A NO, IT WOULDN'T.

25 Q THEY'D HAVE BEEN WORKING OVER ON THE FACE.

1 A THEY WOULD HAVE BEEN WORKING ON THE FACE COM-
2 PLETELY THROUGH THAT UNTIL WE ENTERED THE DAYLIGHT AREA.

3 Q AND YOU BELIEVE, BASED ON YOUR EXPERIENCE IN
4 OBSERVING CONTRACTORS, THAT THAT WOULD BE LESS DIFFICULT
5 THAN THE ORIGINAL--

6 A YES, SIR.

7 Q SO THERE IS A BALANCING THERE. YOU ADMIT THERE'S
8 SOME MORE DIFFICULT AND SOME THAT'S LESS. IS THAT FAIR?

9 A YES.

10 Q NOW, DID YOU DISCUSS THIS CHANGE WITH ANYONE
11 IN U.D.O.T.?

12 A YES, SIR, I DID. WITH THE DESIGNERS IN PRICE.

13 Q WAS IT YOUR--AND IT WAS YOUR RECOMMENDATION THAT
14 THIS CHANGE BE MADE; IS THAT CORRECT?

15 A YES, IT WAS.

16 Q NOW, IN POINT OF TIME, WHEN WOULD THAT DISCUSSION
17 HAVE TAKEN PLACE?

18 A IN THIS CASE IT TOOK PLACE DURING THE PERIOD
19 ALLOWED FOR THE BIDDERS TO MAKE THEIR ESTIMATES ON THE PRO-
20 JECT. THAT'S ABOUT THE TIME WE RECEIVED THE PLANS.

21 Q AND WHAT DID YOU DO TO TRY AND INFORM BIDDERS?

22 A I REQUESTED OUR DISTRICT TO HAVE AN ADDENDUM
23 PUT OUT MAKING THE CHANGE IN THE SLOPE BECAUSE WE WERE
24 TAKING IT ON A 1:1 AND IT WAS GOING TO BE BUILT THAT WAY,
25 BECAUSE WE'D CONFERRED AND AGREED THIS WAS THE WAY TO MAKE

1 THE CHANGE ON THE PROJECT. AND WE POINTED OUT TO ALL THE
2 BIDDERS THE SLOPE STAKES AND EXPLAINED THAT IT IS A 1:1
3 CUT AS DIFFERED FROM THE PLANS THAT STATED A 1/2:1.

4 MR. BABCOCK: YOUR HONOR, I KNOW I MADE MY MOTION
5 EARLIER ON THE TRIAL. I JUST DON'T WANT TO HAVE THAT LOST
6 TRACK OF. AND I RENEW THE MOTION THAT WE EXCLUDE EVIDENCE
7 THAT ATTEMPTS TO VARY THE CLEAR TERMS OF THE CONTRACT
8 DRAWINGS AND PROVISIONS. NOW I KNOW THE COURT'S RULED ON
9 THAT BEFORE, BUT I RENEW THAT SAME MOTION.

10 JUDGE YOUNG: YOUR MOTION IS DENIED. IT APPEARS
11 TO ME THAT THERE IS SUFFICIENT AMBIGUITY, BOTH IN THE METHOD
12 OF THE STAKING, AND IN THE APPLICATION, AND THE DISCUSSIONS,
13 AND THE CONTRACT, THAT ALL OF THE FACTS RELEVANT TO THAT
14 ISSUE NEED TO BE HEARD BY THE COURT. SO THE MOTION IS OVER-
15 RULED.

16 MR. FORD: YOUR HONOR, IF I MIGHT OBSERVE, HE
17 CAN'T HAVE IT BOTH WAYS. HE'S COMING IN HERE RELYING ON
18 CONVERSATIONS WITH MR. KIRKHAM ABOUT THE RIPABILITY OF THE
19 MATERIAL, HE WANTS TO RELY ON THAT, AND YET, HE DOESN'T
20 WANT TO ALLOW THE REVERSE OF IT WHEN WE SAY THAT HE WAS
21 INFORMED IN ADVANCE OF THE CHANGE IN THE SLOPE. SO I THINK
22 HE BETTER DECIDE WHICH WAY HE WANTS IT.

23 I'LL GO EITHER WAY INTO--WELL, IT'S VERY CLEAR
24 MY POSITION. WHAT HE SAID ABOUT THE RIPABILITY IS CONSIS-
25 TENT WITH THE PLANS, AND WHEN IT'S CONSISTENT IT'S

1 ADMISSIBLE. HIS POSITION ABOUT RIPABILITY IS CONSISTENT
2 WITH THE SHRINK/SWELL REMARKS AND NOTATIONS IN THE PLANS.
3 SO HIS COMMENTS AS TO THAT, I THINK, ARE ADMISSIBLE. WHEN
4 HE SAYS THAT THE SLOPE IS 1:1 THAT'S DIAMETRICALLY OPPOSED
5 TO THE CLEAR NOTES AND THE DRAWINGS. AND FOR THAT PURPOSE,
6 I THINK, THEN, WHEN YOU HAVE ORAL EVIDENCE, PRE-CONTRACT
7 SIGNING THAT IS INTENDED TO VARY A CLEAR TERM OF THE CON-
8 TRACT, THAT'S INADMISSIBLE. SO I THINK MY POSITION IS CON-
9 SISTENT WITH THE RULING.

10 JUDGE YOUNG: WELL, YOU'VE MADE YOUR ARGUMENT.

11 Q (BY MR. FORD) NOW, HOW MANY OF THE BIDDERS CON-
12 TACTED YOU FOR THE PURPOSE OF VIEWING THE SITE PRIOR TO
13 BIDDING? DO YOU REMEMBER?

14 A NO, I DON'T REMEMBER EXACTLY. MOST OF THEM--
15 I BELIEVE THERE WAS A COUPLE THAT DID NOT VISIT THE SITE,
16 BUT I COULDN'T STATE WHO THEY WERE.

17 Q DO YOU RECALL VISITING THE SITE WITH MR.
18 DIDERICKSEN, MR. FILLMORE AND MR. FATEMI?

19 A YES, I DO.

20 Q AND DID YOU HAVE CONVERSATION WITH THEM DURING
21 THE TIME THAT THEY WERE ON THE PROJECT?

22 A YES, I DID.

23 Q WHERE DID THOSE CONVERSATIONS TAKE PLACE?

24 A FROM THE TIME I PICKED THEM UP AT THE HALLS
25 CROSSING UNTIL I LEFT THEM BACK AT HALLS CROSSING WHEN THEY

1 FLEW OUT AGAIN.

2 Q DID YOU DISCUSS HOW THE PREVIOUS CONTRACTOR HAD
3 PERFORMED THE PROJECT IN THAT AREA?

4 A YES, I DID.

5 Q HOW DID THAT CONVERSATION ARISE?

6 A I DON'T REMEMBER EXACTLY THE ORIGIN OF IT BUT
7 WE DISCUSSED THE FACT THAT THE PREVIOUS CONTRACTOR HAD RIPPED
8 ALL OF IT USING D9 DOZERS WITH A SINGLE TOOTH RIPPER.

9 Q DO YOU REMEMBER SPECIFICALLY WHAT YOU TOLD THEM?

10 A IN EFFECT THEY HAD USED A D9 DOZER WITH A SINGLE
11 TOOTH RIPPER AND HAD RIPPED IT ALL AND HAD USED SCRAPERS
12 TO MOVE IT DOWN INTO THIS LARGE FILL.

13 Q DID THAT EARLIER PROJECT DIFFER FROM THE PROJECT
14 THAT WAS BUILT BY PROCON AND, IF SO, HOW?

15 A THROUGH THIS SPECIFIC AREA?

16 Q YES.

17 A THE IN INITIAL PROJECT HAD A FULL CUT THROUGH FOR
18 ABOUT ONE-HALF OF THE LENGTH OF THE CUT, AND THEN THEY WENT
19 INTO THE SIDE HILL ON THE--AS THEY BROKE OUT THROUGH THE
20 LOWER PART OF THAT CUT AREA.

21 Q SO IN THE LOWER PART OF THE CUT IT WAS SIMILAR
22 TO WHAT PROCON WAS BEING ASKED TO DO?

23 A YES.

24 Q OR SLIVER CUT, IN OTHER WORDS.

25 A YES.

1 Q DO YOU RECALL THE PREVIOUS CONTRACTOR DOING ANY
2 BLASTING IN THE CUT?

3 A NOT IN THE CUT ITSELF. AS I RECALL, THERE'S
4 WHAT YOU CALL SOME SECONDARY SHOOTING OF LARGE BOULDERS
5 THAT HAD COME OFF OF THE TOP THAT WERE THERE. THAT'S THE
6 WAY I RECALLED WHAT THEY DID, BUT THERE WAS NO PATTERN
7 BLASTING OR DRILLING OR SHOOTING IN THIS CUT ITSELF.

8 Q IN YOUR CONVERSATIONS WITH PROCON'S REPRESENTA-
9 TIVES DID YOU MERELY PROVIDE THE INFORMATION ABOUT WHAT
10 THE PREVIOUS CONTRACTOR DID OR DID YOU GIVE AN OPINION AS
11 TO WHETHER THEY WOULD BE ABLE TO RIP THE MATERIAL?

12 A I PROVIDED INFORMATION. I GAVE NO OPINION AT
13 ALL.

14 Q DID OTHER CONTRACTORS ASK YOU CONCERNING THAT,
15 HOW THE MATERIAL HAD BEEN REMOVED BY THE EARLIER CONTRACTOR?

16 A YES, THEY DID.

17 Q DID ANY OF 'EM NOT ASK YOU ABOUT THAT?

18 A NOT THAT I RECALL.

19 Q THEY ALL WANTED TO KNOW THEN?

20 A YES, SIR, THEY DID.

21 Q SO YOU DID NOT GIVE AN OPINION THAT PROCON WOULD
22 BE ABLE TO RIP IT?

23 A NO, I'M VERY CAREFUL NOT TO GIVE OPINIONS DURING
24 THE BIDDING PHASE.

25 Q NOW, WHAT OTHER PARTS OF THE PROJECT DID YOU

1 VISIT OR STOP AT OR MAKE COMMENTS ON?

2 A WE DISCUSSED THE FILL AREA STANDING AT THE END
3 POINT THAT EXISTED. WE TALKED ABOUT THE FILL OF THE HIGHWAY
4 FILL WHERE IT--

5 Q LET'S USE EXHIBIT 15-P WHICH IS, WE'VE ESTAB-
6 LISHED, IS THE WAY THE PROJECT LOOKED OR WOULD HAVE LOOKED
7 WHEN YOU WENT ON IT. TELL US WHERE YOU WERE STANDING AND
8 WHAT REFERENCES YOU POINTED OUT.

9 A WE STOOD OUT IN THIS VICINITY ON THIS ROAD AREA,
10 AND LOOKING DOWN INTO THE HIGHWAY ALIGNMENT, WHICH IS COMING
11 AROUND THE CURVE OFF THIS WAY, WE POINTED OUT WHERE THE
12 CENTERLINE STAKES WENT OUT ACROSS HERE AND DISCUSSED THE
13 FACT THAT THE HIGHWAY FILL WENT THAT WAY AND THAT THE WASTE
14 AREA WENT OFF TO THE SOUTH. AND BECAUSE OF THE CONDITIONS
15 WOULD ALSO HAVE A SLOPE THIS WAY DOWN TOWARD THE DRAINAGE
16 CHANNEL THAT YOU CAN SEE WHEN YOU'RE STANDING THERE.

17 Q WOULD EXHIBIT 33-D HELP EXPLAIN WHAT YOU'RE
18 TALKING ABOUT THERE WHEN YOU REFER TO THE DRAINAGE CHANNELS?

19 A YES. THIS POINT EXISTED SOMEWHERE IN THIS
20 VICINITY AT THE TIME WITH STEEP DROPS OFF BOTH SIDES. AND
21 THIS IS THE DRAINAGE CHANNEL COMING OUT RIGHT HERE, THAT
22 BECAUSE OF THE END OF THE WASTE AREA AT THIS POINT AND THE
23 2:1 STEEPNESS IT WAS GOING TO SLOPE THIS DIRECTION AND THIS
24 DIRECTION TO ESTABLISH A 2:1 RIGHT OFF OF THIS POINT. WE
25 DISCUSSED THAT.

1 AND THIS IS THE HIGHWAY ALIGNMENT FILL AS DEFINED
2 RIGHT HERE. THIS IS WHERE THE ALIGNMENT CAME AROUND. AND
3 WE WAS COMING BACK INTO THE EXISTING ROAD AND THAT FILL
4 HAD TO BE BUILT ACROSS THERE.

5 Q OKAY. AND WHAT OTHER ITEMS WERE DISCUSSED AT
6 THAT TIME? DO YOU REMEMBER?

7 A WE DISCUSSED THE FACT THAT ALL THE WASTE MATERIAL
8 THAT THERE WAS COULD BE PLACED IN THIS. THE WASTE SURVEY
9 ROAD EXCAVATION BEYOND WHAT WENT IN THE ROADWAY PRISM SEC-
10 TION HAD TO BE COMPACTED, IT HAD TO BE PLACED AND KEYED
11 IN AND COMPACTED.

12 AND THEN WE ALSO DISCUSSED THE AVAILABILITY OF
13 WATER AND REVIEWED SITES OF IT AND THE FACT THAT OUR EXPER-
14 IENCES HERE HAD BEEN THAT THIS MATERIAL CAME OUT WITH CONSI-
15 DERABLE MOISTURE, EIGHT TO TEN PERCENT NATURAL MOISTURE,
16 AND WE HADN'T EXPERIENCED A NEED FOR A LOT OF MOISTURE FOR
17 COMPACTION WHEN WE BUILT THIS ORIGINALLY, BUT WE NEEDED
18 MOISTURE FOR, WATER FOR DUST CONTROL, BUT WE DIDN'T HAVE
19 TO HAVE A LOT TO GET DENSITY IN THE FILLS.

20 Q OKAY. DO YOU RECALL ANY OTHER CONVERSATION ON
21 THAT OCCASION?

22 A WE DISCUSSED THE FACT THAT THE AVAILABILITY OF
23 WATER NECESSITATES A PERMIT FROM THE B.L.M. WE TALKED ABOUT
24 GETTING WATER FROM THE RANCHER AND THAT IF WE GOT IT FROM
25 HIM WE MAY HAVE TO PAY HIM OFF IN SOME KIND OF WORK OR SOME-

1 THING FOR THE WATER. AND THE LIMITATIONS OF OPERATIONS
2 BECAUSE OF THE ARCHAEOLOGICAL IN THE AREA, AND JUST GENERAL
3 CONDITIONS OF THE AREA, AND THE AVAILABILITY OF FACILITIES
4 AND LACK OF THEM.

5 Q THIS DRAINAGE CHANNEL TO THE LEFT OF THE FILL,
6 WAS ANYTHING SAID ABOUT PLACING MATERIAL IN THAT AREA?
7 IN THAT CHANNEL?

8 A WE DISCUSSED THE FACT THAT WITH THE SLOPES GOING
9 OUT THAT WE HAD TO--WE'D BE REQUESTED BY THE B.L.M. TO STAY
10 OUT OF THAT, IF POSSIBLE, WITH THAT CHANNEL AREA SO WE DON'T
11 FILL IT UP.

12 Q IN THAT VISIT--DID I ASK YOU ABOUT DISCUSSIONS
13 CONCERNING THE SLOPE ANGLE? WHERE DID THOSE TAKE PLACE?

14 A WHEN WE WERE--I BELIEVE THEY TOOK PLACE WHEN
15 WE ARRIVED AT THE CUT SLOPE. WE DISCUSSED IT WAS STAKED
16 ON A 1:1 AND WOULD BE TAKEN OUT, AND THAT THE PLANS DID
17 SHOW A 1/2:1, BUT THAT I'VE REQUESTED AN ADDENDUM TO BE
18 MADE TO CORRECT THAT, BUT IT WAS GOING TO BE TAKEN OUT ON
19 A 1:1 BECAUSE THAT'S THE WAY WE HAD STAKED IT.

20 Q OKAY. DID YOU POINT OUT THE STAKES TO THEM?

21 A YES, WE POINTED OUT WHERE THEY WERE AT THE TOP
22 OF THE CUT COMING ACROSS THE TOP.

23 Q APPROXIMATELY HOW HIGH ABOVE THE ROADWAY WERE
24 THEY?

25 A THE HIGHEST ARE APPROXIMATELY 200 FEET.

1 Q WERE THEY OBSERVABLE FROM THE ROADWAY SURFACE?

2 A YOU COULD SEE THE FLAGS ON THE STAKES UP ON THE
3 SLOPE.

4 Q SUBSEQUENT TO THAT TIME, AND PRIOR TO THE TIME
5 THE PROJECT WAS BID, DO YOU RECALL ANY OTHER CONTACT WITH
6 PROCON OR ANY OF ITS REPRESENTATIVES?

7 A I DON'T RECALL ANY CONTACT, NO, SIR.

8 Q ANY TELEPHONE CALL OR ANYTHING LIKE THAT THAT
9 YOU REMEMBER?

10 A NO, I DON'T. DON'T RECALL ANY.

11 Q DO YOU KNOW WHY AN ADDENDUM WASN'T ISSUED?

12 A NO, SIR, I DON'T.

13 Q WAS ANYTHING SAID ABOUT ENCOUNTERING BOULDERS
14 IN THE PROJECT THAT YOU RECALL?

15 A YES. THE CONTRACTOR ASKED ABOUT BOULDERS AND
16 I SAID THAT DURING THE EXCAVATION WHEN THEY HAD RIPPED IT
17 OUT WE HADN'T ENCOUNTERED ANY BOULDERS. THE ONLY LARGE
18 BOULDERS IN THAT THAT WE HAD HAD AN ENCOUNTER WITH WERE
19 THOSE THAT HAD FALLEN FROM THE MASSIVE FORMATIONS ABOVE
20 US IN THE FILL DUE TO THE LAYERING OF THIS. AND WHEN THEY
21 RIPPED IT THERE WASN'T ANY LARGE BOULDERS ENCOUNTERED.

22 Q YOU'VE HEARD TESTIMONY FROM EARLIER WITNESSES
23 ABOUT PICKING UP A ROCK AND SMASHING IT ON THE ROADWAY.
24 ABOUT YOU PICKING UP A ROCK. DO YOU REMEMBER THAT?

25 A YES, SIR.

1 Q TELL US ABOUT THAT.

2 A THAT WAS IN THE DISCUSSION ABOUT THE FACT THAT
3 THE MATERIAL WEATHERED QUITE RAPIDLY. WE WERE TALKING ABOUT
4 THE FACT THAT THE MATERIAL, WHEN EXPOSED, DETERIORATED
5 RAPIDLY. I PICKED UP A BOULDER OF SOME, AS I RECALL, EIGHT,
6 TEN INCHES, AND DROPPED IT AND IT JUST DISINTEGRATED INTO
7 SMALL FRAGMENTS.

8 Q WOULD BE THAT THE CONDITION OF A BOULDER, OR
9 A ROCK, WHEN IT WAS FIRST RIPPED OUT OF THE CUT?

10 A NO, IT WOULDN'T.

11 Q DID YOU HAVE A CONVERSATION WITH THE DRILLER
12 ON ONE OCCASION?

13 A YES, I DID.

14 Q AND WAS THAT RELATIVE TO THE HARDNESS OF THE
15 MATERIAL?

16 A YES, IT WAS.

17 Q WANT TO TELL US ABOUT THAT?

18 A DURING THE FIRST PHASES OF THE DRILLING THE
19 DRILLER ASKED THAT I COME OUT TO THE PROJECT BECAUSE OF
20 THE DIFFICULTY THEY WERE HAVING DRILLING. SO I WENT OUT
21 TO OBSERVE IT. AND DURING THE NIGHT IT HAD RAINED. AND
22 HE WENT UP TO EXPLAIN HOW HARD THE ROCK WAS, AND HE PICKED
23 UP A BOULDER AND IT FELL APART IN HIS HANDS. AND HE SAYS,
24 DAMN IT, YESTERDAY I COULDN'T DRILL IT, TODAY I CAN'T PICK
25 IT UP.

1 Q AND IS THAT TYPICAL OF THAT TYPE OF MATERIAL?
2 A IN THIS AREA, YES.
3 Q NOW, YOU HEARD MR. BABCOCK'S TESTIMONY YESTERDAY
4 ABOUT THE LOCATION OF MATERIAL AND HIS ESTIMATE OF WHERE
5 THE WASTE IS PLACED.
6 A YES, SIR.
7 Q DO YOU HAVE ANY REASON TO CHALLENGE OR QUESTION
8 HIS CONCLUSIONS?
9 A AS TO WHERE THE MATERIAL IS?
10 Q MM-HMM. (YES).
11 A NO, SIR.
12 Q WOULD YOU EXPLAIN WHY THE MATERIAL IS THERE THEN.
13 A YES. THIS IS A CASE OF TRYING TO FOLLOW THE
14 PLANS AND THE END RESULT NOT BEING IN ACCORDANCE WITH THEM.
15 AS EXPLAINED WHEN WE STARTED THE CRITICAL AREA FOR THIS
16 PROJECT, WAS THIS INTERFACE WHERE THE FILL ACROSS HERE CAME
17 BACK INTO THIS DAYLIGHTED AREA. AND AS YOU STOOD RIGHT
18 HERE, WHICH IS APPROXIMATELY 867+25, THIS WAS A SHEAR DROP-
19 OFF IN TWO DIRECTIONS TO THE SOUTH AND EASTERLY. AT THAT
20 POINT WAS WHERE THE WASTE FILL WAS TO START TO THE SOUTH,
21 AND WHEN YOU OBSERVE THAT, IF YOU DID, YOU HAD A SLOPE HERE
22 THAT WOULD BE STANDING VERTICAL. SO WE DETERMINED WE HAD
23 TO PUT A 2:1 SLOPE EASTERLY TO HOLD THAT. AND THAT'S WHERE
24 WE BEGAN SLOPE STAKING BECAUSE OF THE 200 FOOT HEIGHTH THAT
25 APPROXIMATES 867, WOULD BE PUT IT AT ABOUT 400 FEET AHEAD,

1 OR AROUND 871. SO WE DETERMINED THAT WE'D ESTABLISH THE
2 2:1 SLOPE FOR THIS SUPPORTING FILL HERE AT THIS POINT,
3 COMING BACK TO MEET THE DAYLIGHT AREA, AND THEN CARRY THE
4 SLOPE SOUTH ON THE 2:1 AND BRING 'EM BACK IN WHERE WE WENT
5 WITH THE DAYLIGHT. AS IT TURNED OUT, BECAUSE OF THE MAGNI-
6 TUDE OF THIS SLOPE AREA, ALL THE MATERIAL, OR THE VAST
7 MAJORITY OF IT, ENDED UP IN THIS 2:1 SLOPE AHEAD OF THE
8 DESIGNATED STATION, 867+25, PLUS OR MINUS, IT ENDED UP AHEAD
9 OF IT INSTEAD OF ON THE SOUTH SLOPE.

10 Q SIMPLY RAN OUT OF MATERIAL.

11 A YES.

12 Q NOW, YOU'VE HAD AN OPPORTUNITY TO VISIT THE PRO-
13 JECT ON VARIOUS OCCASIONS, YOU SAW IT BEFORE IT HAPPENED,
14 BEFORE IT WAS CONSTRUCTED. IS THERE ANY MATERIAL DIFFERENCE
15 IN THE PLACEMENT OF MATERIAL HERE AS OPPOSED--AND BY THAT
16 I'M REFERRING TO THE SOUTH, OR TO THE EAST.

17 A YOU MEAN IN DIFFICULTY?

18 Q IN DIFFICULTY.

19 A NO. THE SAME BECAUSE OF THE STEEPNESS OF THE
20 SLOPES ARE VERY SIMILAR THERE.

21 Q DID YOU HAVE OCCASION TO, ON YOUR VISIT TO THE
22 PROJECT, TO OBSERVE THE TYPE OF EQUIPMENT THAT PROCON USED
23 IN THEIR CONSTRUCTION TECHNIQUE?

24 A YES, SIR.

25 Q WHAT--BASED ON YOUR EXPERIENCE, DO YOU THINK

1 THEY HAD A GOOD TECHNIQUE OR A GOOD CONCEPT OF HOW TO PER-
2 FORM THIS PROJECT?

3 A I DIDN'T UNDERSTAND THEIR CONCEPT INITIALLY.
4 I HAD NOT BEEN FAMILIAR WITH THAT TYPE OF OPERATION.

5 Q WHEN YOU SAY "THAT TYPE OF OPERATION"--

6 A THE BACKHOE, AND THE USING OF THE BACKHOE TO
7 LOAD OUT THE TRUCKS AND BRING IT DOWN. I HADN'T SEEN THAT
8 BEFORE SO I WAS UNFAMILIAR WITH IT. AND I THOUGHT THAT
9 THERE WAS OTHER METHODS, BETTER METHODS, BECAUSE I WAS
10 UNFAMILIAR WITH THAT.

11 Q WHAT METHODS WOULD YOU HAVE THOUGHT WOULD HAVE
12 BEEN BETTER?

13 A I PERSONALLY WOULD HAVE THOUGHT USING SCRAPERS
14 WOULD HAVE BEEN A BETTER WAY TO DO IT.

15 Q AND HOW WOULD THAT HAVE BEEN ACCOMPLISHED?

16 A TO USE THE SCRAPERS?

17 Q UH-HUH.

18 A IT WOULD HAVE DEVELOPED THE CUT AND BRING THE
19 SCRAPERS OFF, DROP OFF THE SLOPE, STRAIGHT OFF THE SLOPE,
20 AND BUILT THE FILLS, AND PUT THE WASTE AROUND. AND THEN
21 PROBABLY REQUIRE A DOZER TO PUSH IT BACK UP BECAUSE THEY
22 DON'T CLIMB TOO WELL.

23 Q WHAT'S THE ADVANTAGE OF THAT, IN YOUR OPINION?

24 A IS THE FACT THAT YOU CAN BRING YOUR SCRAPERS
25 OFF, QUITE EASILY OFF THAT SLOPE, AND AS THEY DESCEND YOU

1 DON'T HAVE A BRAKE PROBLEM BECAUSE THEY COULD DRAG THE PAN
2 OF THE SCRAPER DOWN THE SHOOT THAT THEY ARE COMING DOWN
3 AND BRING THE MATERIAL DOWN WITH THEM. AND THEY CAN COME
4 DOWN, RELATIVELY SPEAKING, QUITE RAPIDLY BECAUSE THEY HAVE
5 CONTROL AS THEY DROP DOWN.

6 Q AND THEY ONLY HAVE TO HANDLE THE MATERIAL ONE
7 TIME.

8 A YES. THEY LOAD IT ONE TIME, TAKE IT DOWN, AND
9 THEN PLACE IT.

10 Q NOW, AS THEY BRING THE FILL UP, THE PROBLEMS
11 OF DESCENDING BECOME LESS AND LESS, DON'T THEY?

12 A YES, SIR, THAT'S CORRECT.

13 Q SO TELL US THEN WHAT YOU OBSERVED ABOUT THEIR
14 METHOD.

15 A ON THEIR METHOD I THOUGHT, AT THE TOP WHERE THEY
16 WERE BREAKING OUT, USING BACKHOE TO USE THE SLIVER CUT,
17 I THOUGHT WAS EXCELLENT. I HADN'T SEEN IT AND IT WORKED
18 REAL WELL. SEEMED LIKE THE PROBLEM THAT DEVELOPED WAS THE
19 FACT THAT AS WE GOT DOWN, GETTING THE BIG TRUCKS DOWN THE
20 AREA TO GET ACCESS TO THE HIGHWAY FILL, THERE'S A REAL
21 PROBLEM WITH THE BRAKES AND HANDLING IT THAT WAY. AND THEY
22 PICKED UP THE MATERIAL AND WE HANDLED IT VARIOUS TIMES
23 BECAUSE OF THOSE PROBLEMS OF HAVING TO BRING THE TRUCKS
24 DOWN AND THE TIMES THEY WOULD DEPOSIT MATERIAL IN ONE AREA
25 AND THEN DOZE IT AHEAD AND OFF A STEEP RIM TO ANOTHER AREA.

1 THEY WERE HANDLING IT MORE THAN ONCE.

2 Q IN THE PHOTOGRAPH IN FRONT OF YOU, WHICH IS
3 EXHIBIT 33-D, IT APPEARS THAT THIS CAT IS CUTTING A ROADWAY
4 COMING UP TO THE EXISTING ROAD IN THE FILL AREA; IS THAT
5 CORRECT?

6 A YES, SIR.

7 Q TELL US ABOUT THAT. DID YOU REQUIRE THAT?

8 A NO, WE DIDN'T REQUIRE IT. WE ALLOWED THE CON-
9 TRACTOR--

10 Q DESCRIBE FIRST THE CONDITION.

11 A AS THE HIGHWAY FILL PINCHED OUT TO THE ALIGNMENT,
12 RETURNING INTO THE EXISTING ALIGNMENT, THIS FILL WOULD HAVE
13 ENDED, SOMEWHERE AT THE BOTTOM WOULD HAVE ENDED, AND THERE
14 WOULD HAVE BEEN A SLIVER FILL PLACED UP THE SLOPE AS WE
15 WENT EASTERLY UNTIL THE TWO WERE BACK TOGETHER. BECAUSE
16 OF THE DIFFICULT ACCESS AND PINCHING OUT OF, TRYING TO BUILD
17 THIS FILL ON THE SLOPE, WE ALLOWED THE CONTRACTOR TO CONTINUE
18 HIS, IF YOU WILL, WITH THE FILL HE COULD GET EQUIPMENT ON
19 RIGHT ACROSS, ALL THE WAY ACROSS THAT FILL, FOR ACCESS,
20 AND TO BE ABLE TO BRING HIS EQUIPMENT THROUGH IN A CIRCULAR
21 HAUL, EMPTY TRUCKS COMING BACK UP THE ROAD SO THEY DIDN'T
22 HAVE TO RUN EQUIPMENT OUT AND TURN AND COME BACK ALL THE
23 TIME.

24 Q WHO DID YOU TALK TO ABOUT PERMITTING THAT?

25 A THE SUPERINTENDENT ON THE PROJECT.

1 Q WAS THAT MR. THOMAS?

2 A YES, I BELIEVE IT WAS.

3 Q AND THIS PHOTOGRAPH THAT YOU JUST LOOKED AT WAS

4 TAKEN THE 4TH OF AUGUST. IN POINT OF TIME HAD THAT CONVER-

5 SATION TAKEN PLACE BEFORE THAT?

6 A OH, YES, SIR.

7 Q I HAND YOU WHAT'S BEEN PREVIOUSLY MARKED AND

8 ADMITTED AS EXHIBIT 18-P WHICH IS A LETTER DATED APRIL 14.

9 DO YOU RECALL RECEIVING THAT LETTER?

10 A NO, SIR, I DON'T.

11 Q HAVE YOU CHECKED THE RECORDS AND FILES THAT YOU

12 KEPT FOR THIS PROJECT TO SEE IF THE ORIGINAL OF THAT LETTER

13 WAS IN THERE?

14 A YES, I HAVE. I'VE BEEN COMPLETELY THROUGH THE

15 FILES AND I DID NOT FIND A COPY OF THAT LETTER.

16 Q HAVE YOU DISCUSSED WITH YOUR OFFICE MANAGER

17 WHETHER HE EVER SAW THAT?

18 A YES, I DID. HE INDICATED THAT HE HAD NOT SEEN

19 IT EITHER.

20 Q WHEN WAS THE FIRST TIME THAT YOU SAW THAT LETTER?

21 A I BELIEVE IT WAS ABOUT A YEAR AGO WHEN YOU HANDED

22 IT TO ME IN ONE OF OUR MEETINGS.

23 Q THERE IS A CONVERSATION REFERRED TO IN THERE

24 WHERE MR. FILLMORE RECITES, REFERS TO CONVERSATION EITHER

25 THAT DAY OR THE PREVIOUS DAY. WHICH IS IT?

1 A I DON'T THINK IT SAYS IT. IT JUST SAYS, "AS
2 A FOLLOW-UP TO OUR TELEPHONE CONVERSATION CONCERNING LARGE
3 MATERIAL WE HAVE ENCOUNTERED." IT DOESN'T GIVE A DATE OF
4 THE CONVERSATION.

5 Q OKAY. DO YOU RECALL ANY CONVERSATION WITH MR.
6 FILLMORE ABOUT THAT?

7 A NO, I DON'T.

8 Q LET ME SEE THAT FOR A MOMENT? REFERRING YOU
9 TO THE THIRD PARAGRAPH WHICH TALKS ABOUT THE DIRECTED CHANGE
10 IN THE DESIGNATED WASTE AREA. DO YOU RECALL ANY CONVERSATION
11 CONCERNING THAT AT OR ABOUT THAT TIME?

12 A I DON'T RECALL ANY CONVERSATION ABOUT A DIRECTED
13 CHANGE BECAUSE, PERSONALLY, I DIDN'T FEEL WE HAD CHANGED
14 THE WASTE AREA BECAUSE WE WERE STARTING AT THE, WHAT WAS
15 THE END OF THE WASTE AREA WITH OUR 2:1 SLOPE. AND I FELT
16 THAT THE WASTE AREA WAS STILL AS THE PLANS INTENDED TO START
17 AND WE JUST PUT A SLOPE ON IT IN ORDER TO HOLD THE FILL.
18 SO I DIDN'T FEEL IT HAD CHANGED BUT I DON'T RECALL ANY CON-
19 VERSATION AT ALL.

20 Q WHEN WAS THE FIRST TIME THAT YOU REALIZED THAT
21 PROCON WAS CONCERNED ABOUT WHAT WAS REQUIRED WITH THE PLACE-
22 MENT OF THE WASTE OR THE CHANGE OF THE LOCATION?

23 A I THINK IT WAS ABOUT THE TIME WE DISCUSSED THIS
24 LETTER, WHEN YOU SHOWED ME THE LETTER, AND WE BEGAN
25 DISCUSSING THAT ISSUE.

1 Q SO DURING THE LIFE OF THE PROJECT YOU WERE UNAWARE
2 THAT THEY WERE CONCERNED ABOUT THAT; IS THAT CORRECT?
3 A OF THE LOCATION OF THE WASTE, YES.
4 Q DOES THE MAIL COME TO YOUR OFFICE DIRECTLY OR
5 DOES IT PASS THROUGH ANOTHER OFFICE?
6 A IT COMES TO MY OFFICE DIRECTLY.
7 Q U.S. MAIL?
8 A U.S. MAIL.
9 Q DO YOU HAVE ANY EXPLANATION FOR WHY YOU DIDN'T
10 RECEIVE THAT LETTER?
11 A NO, SIR, I DON'T.
12 Q DO YOU HAVE ANY OPINION AS TO THE CAPABILITY
13 OF THE EMPLOYEES THAT WERE ON THE PROJECT AND WORKED FOR
14 PROCON?
15 A I'M NOT SURE I UNDERSTAND YOUR QUESTION.
16 Q WELL, EMPLOYEES, PROCON'S EMPLOYEES HAD PERFORMED
17 THE WORK, THE OPERATORS. WERE THEY GOOD OPERATORS IN YOUR
18 OPINION?
19 A TO THE AMOUNT OF TIME I WAS OUT THERE THEY
20 APPEARED TO BE CAPABLE, YES, SIR.
21 Q WHAT ABOUT THE SUPERINTENDENT THAT WAS IN CHARGE,
22 DID HE SEEM TO KNOW WHAT HE WAS DOING?
23 A YES, SIR, HE DID.
24 Q DID HE HAVE ANY DIFFICULTY UNDERSTANDING THE
25 CONCEPT OF SHRINK AND SWELL, THAT YOU RECALL?

1 A NOT THAT I RECALL, NO, SIR.
2 JUDGE YOUNG: LET'S TAKE A RECESS AT THIS TIME,
3 MR. FORD.
4 MR. FORD: THANK YOU.
5 (RECESS).
6
7 JUDGE YOUNG: PLEASE CONTINUE.
8 Q (BY MR. FORD) MR. KIRKHAM, DO YOU HAVE A
9 RECOLLECTION OR ANY KNOWLEDGE OF HOW LONG IT TOOK THEM TO
10 CUT THE ROAD TO THE TOP OF THE CUT TO BEGIN BRINGING THE
11 MATERIAL DOWN WITH THE BACKHOE?
12 A NO, I DON'T.
13 Q WOULD THAT INFORMATION SHOW IN YOUR MONTHLY
14 PROGRESS REPORTS?
15 A EITHER IN THE PROGRESS REPORT OR IN THE INSPEC-
16 TOR'S RECORDS.
17 Q DO YOU RECALL WHETHER IT WAS AN UNREASONABLE
18 AMOUNT OF TIME, YOUR RECOLLECTION?
19 A NO, I DON'T BELIEVE IT WAS. IT SEEMS IT WAS
20 REASONABLE FOR THE WORK THEY WERE DOING.
21 Q DID YOU OBSERVE THE OPERATIONS OF THE BLASTING
22 CREW THAT CAME ON THE PROJECT?
23 A YES, I DID. ON VARIOUS OCCASIONS, NOT ALL THE
24 TIME, BUT ON VARIOUS OCCASIONS.
25 Q DID THEY SEEM TO KNOW WHAT THEY WERE DOING?

1 A AS I RECALL, WHAT I OBSERVED THEY DID, YES, SIR.
2 Q DID YOU FEEL IT WAS NECESSARY TO BLAST?
3 A I DIDN'T FEEL IT WAS NECESSARY PERSONALLY.
4 Q WERE THEY HAVING DIFFICULTY RIPPING THE MATERIAL?
5 A YES, THEY WERE.
6 Q DO YOU KNOW WHY?
7 A THEY JUST COULDN'T RIP IT. NO, I DON'T KNOW
8 PHYSICALLY WHY, BUT THEY COULDN'T RIP IT.
9 Q DO YOU BELIEVE THAT A D9 WOULD HAVE BEEN SUCCESS-
10 FUL IN RIPPING IT?
11 MR. BABCOCK: I'LL OBJECT. I THINK IT NEEDS
12 SOME MORE FOUNDATION PROBABLY FROM THIS WITNESS.
13 JUDGE YOUNG: OVERRULED.
14 THE WITNESS: PERSONALLY, I THINK A D9 WITH A
15 SINGLE TOOTH RIPPER COULD HAVE RIPPED IT.
16 Q (BY MR. FORD) DID PROCON EMPLOY A SUBCONTRACTOR
17 NAMED CROWLEY CONSTRUCTION COMPANY?
18 A THEY WEREN'T A SUBCONTRACTOR BUT THEY WERE
19 EMPLOYED BY PROCON, YES, SIR.
20 Q THEIR EMPLOYEES WERE PUT ON THE PROCON PAYROLL?
21 A YES, THEY WERE CARRIED BY PROCON.
22 Q THE EQUIPMENT AND THE OPERATOR CAME FROM CROWLEY
23 CONSTRUCTION?
24 A YES, SIR.
25 Q WHAT SIZE TRACTOR OR CATERPILLAR WAS THAT ONE?

1 A I BELIEVE THEY HAD A D7 CATERPILLAR.
2 Q WAS THAT LATER ON IN THE PROJECT?
3 A YES.
4 Q AND DID THEY ALSO PROVIDE SCRAPERS?
5 A YES, THEY DID.
6 Q AND DID THAT WORK OR DID THEY PERFORM WORK WITH
7 SCRAPERS THAT YOU OBSERVED?
8 A YES, THEY DID.
9 Q AND WERE THEY SUCCESSFUL WITH THEM?
10 A YES, THEY WERE VERY SUCCESSFUL WITH THE SCRAPERS.
11 Q NOW, WHAT ABOUT THE TRACTOR THAT CAME FROM
12 CROWLEY? DO YOU REMEMBER WHAT SIZE IT WAS?
13 A AS I JUST STATED, I THINK IT WAS A D7.
14 Q DID YOU OBSERVE THE D7 FROM CROWLEY WITH THEIR
15 OPERATOR PERFORMING ANY RIPPING IN THE DAYLIGHT CUT AREA?
16 A I CAN'T RECALL. I REMEMBER RIPPING BUT I DON'T
17 REMEMBER THAT IT WAS IN THE DAYLIGHT AREA.
18 Q WAS IT IN THE SLIVER CUT AREA?
19 A IT WAS IN THE DITCH LINE AREA THAT I OBSERVED
20 IT, YES, SIR.
21 Q AND WAS HE SUCCESSFUL IN RIPPING WITH THAT
22 TRACTOR?
23 A HE WAS SUCCESSFUL TO A LARGE EXTENT, YES.
24 Q DO YOU HAVE AN OPINION AS TO HIS CAPABILITIES
25 RELATIVE TO THE OTHER EMPLOYEES OF PROCON OPERATED TRACTORS?

1 A NO, I DON'T HAVE AN OPINION ON THAT, SIR.

2 Q I BELIEVE THERE WAS A CONVERSATION ABOUT THE
3 FACT THAT YOU RECEIVED LETTERS FROM PROCON REQUESTING SOME
4 TIME EXTENSIONS. DO YOU RECALL THOSE?

5 A YES, SIR.

6 Q DID YOU RESPOND TO THOSE LETTERS?

7 A VERBALLY I RESPONDED BUT NOT IN WRITING.

8 Q WHY NOT?

9 A AT THE TIME I DIDN'T HAVE SOMEONE AT THE OFFICE
10 WRITING LETTERS AND I ALSO NEEDED TO TALK WITH THE FEDERAL
11 PEOPLE REGARDING IT BEFORE I RESPONDED. WE REQUESTED THEM
12 TO COME TO THE PROJECT. AND BEFORE THEY GOT THERE, THE
13 TIME INDICATED IN THE LETTER THAT WE REQUESTED EXTENSIONS
14 HAD BEEN EXCEEDED AND I DIDN'T THINK IT WAS WISE TO GET
15 DOCUMENTING AT THAT POINT SO THAT LATER THE FEDERALS WOULD
16 HAVE A TRACK RECORD TO SAY, WELL, YOU WANTED 30 DAYS HERE,
17 NOW YOU WANT 60 DAYS. AND SO I DIDN'T RESPOND IN WRITING
18 BUT WE TRIED TO GET THE FEDERAL PEOPLE THERE AND HOLD AN
19 OPEN-ENDED DISCUSSION TOWARD THE AMOUNT OF TIME EXTENSION
20 RATHER THAN LIMIT IT TO THE 30 DAYS.

21 Q NOW, DID U.D.O.T. STANDARDS SPECIFICATIONS ALLOW
22 ADDITIONAL TIME WHEN YOU DO ADDITIONAL WORK?

23 A YES, SIR.

24 Q IS THAT BASED ON DOLLAR AMOUNT OF THE CONTRACT?

25 A YES, IT IS.

1 Q SO IF 90 DAYS IS ALLOWED FOR THIS PROJECT OF
2 700,000, AND IF IT OVERRUNS BY 10 PERCENT, THEN YOU GET A
3 STRAIGHT RATIO AS FAR AS TIME; IS THAT CORRECT?

4 A YES, THAT'S NORMALLY CORRECT, SIR.

5 Q SO IF THEY DID 17 PERCENT ON THE ROADWAY EXCA-
6 VATION THAT'S NOT THE ONLY ITEM IN THE PROJECT, IS IT?

7 A NO, SIR.

8 Q BUT THAT WAS A MAJOR ITEM.

9 A YES.

10 Q SO AN OVERRUN OF THAT MAGNITUDE WOULD GENERATE
11 SOME ADDITIONAL DAYS.

12 A YES, IT WOULD.

13 Q JUST AUTOMATICALLY.

14 A YES, SIR.

15 Q WAS IT YOUR INTENTION TO GIVE HIM TIME IN ADDITION
16 TO THAT?

17 A MY INTENTION WAS, YES, TO GIVE 'EM ADDITIONAL
18 TIME.

19 Q DO YOU HAVE ANY JUDGMENT AT THIS TIME AS TO HOW
20 MUCH ADDITIONAL TIME YOU FELT--THIS MAY BE UNFAIR BECAUSE
21 I DIDN'T ASK YOU THIS BEFORE COMING HERE--BUT AT THIS POINT,
22 DO YOU HAVE ANY JUDGMENT OR HAVE YOU THOUGHT ABOUT IT, AND
23 DO YOU HAVE A NUMBER OF DAYS THAT YOU WOULD FEEL WOULD BE
24 REASONABLE?

25 A RIGHT NOW I CAN'T RECALL HOW MANY DAYS WE ACTUALLY

1 EXPENDED ON THE PROJECT. INTO THE FALL. BUT MY FEELING
2 WAS, BECAUSE OF THE DIFFICULTY, AND WHAT WAS GOING ON, TO
3 TRY TO GET A TIME EXTENSIOIN AS MUCH AS POSSIBLE. BUT THE
4 NUMBER OF DAYS I CAN'T RECALL.

5 MR. FORD: YOUR HONOR, I DON'T WANT TO BURDEN
6 THE RECORD WITH THESE WEEKLY PROGRESS REPORTS BUT I JUST
7 MIGHT HAND 'EM AND SAY I COULD MAYBE ASK HIM IF THIS WOULD
8 RECALL . . .

9 Q (BY MR. FORD) COULD YOU LOOK AT THE WEEKLY PRO-
10 GRESS REPORTS THAT I HANDED YOU, AND USING THAT TO REFRESH
11 YOUR RECOLLECTION, TELL US HOW MANY DAYS THE PROJECT TOOK
12 DURING 1986. THAT YOU CHARGED, ANYWAY. TAKE JUST A MINUTE.

13 A THROUGH 1986 WE HAD CHARGED 161 DAYS.

14 Q NOW, THAT'S ACTUAL WORKING DAYS. IS THAT CORRECT?

15 A THAT'S THE ACTUAL DAYS THAT WERE WORKED, YES.

16 Q IF IT RAINS AND THE CONDITIONS ARE SUCH THAT
17 THE CONTRACTOR CAN'T REASONABLY WORK YOU DON'T CHARGE TIME.

18 A THAT'S CORRECT, YES, SIR.

19 Q HOLIDAYS AREN'T CHARGED.

20 A NO, HOLIDAYS ARE NOT CHARGED, NOR ARE SATURDAYS
21 AND SUNDAYS.

22 Q NOW, THE CONTRACT ALLOWED FOR 90 DAYS. AND I
23 THINK THERE WAS LATER AN EXTENSION GRANTED BASED ON THE
24 QUANTITY, OR THE DOLLAR FIGURES, SOME 12 OR 13 DAYS. DO
25 YOU REMEMBER?

1 A I DON'T REMEMBER THE EXTENSION, SIR. IT WAS
2 AFTER THE PROJECT HAD LEFT MY CONTROL, IF THAT WAS PUT IN.

3 Q NOW, WAS THIS PROJECT LATER TERMINATED BY AGREE-
4 MENT?

5 A YES, SIR, IT WAS.

6 Q FOR WHAT REASON?

7 A AS I RECALL, IT WAS TERMINATED ABOUT FAILURE
8 OF THE BONDING COMPANY, I BELIEVE. BONDING WENT INTO
9 RECEIVERSHIP AND THE CONTRACTOR WAS UNABLE TO CONTINUE THE
10 WORK AND SO IT WAS TERMINATED.

11 Q AND THAT WAS BY MUTUAL AGREEMENT?

12 A YES, SIR, IT WAS.

13 MR. FORD: I BELIEVE THAT'S ALL THE QUESTIONS
14 I HAVE AT THIS POINT.

15 JUDGE YOUNG: THANK YOU. CROSS-EXAMINATION?

16

17 CROSS-EXAMINATION

18 BY MR. BABCOCK:

19 Q IF I UNDERSTAND YOUR TESTIMONY TODAY, IT WOULD
20 BE THAT THE WASTE AREA--LET ME JUST ASK IT THIS WAY.

21 WAS THE WASTE AREA STAKED AS IT WAS DESIGNATED
22 IN THE PLANS?

23 A I'M TRYING TO--THE WASTE AREA WAS STAKED AS
24 DESIGNATED TO THE EXTENT THAT WE BEGAN STAKING IT RIGHT
25 AT WHAT WAS THE HIGH STATION OF THE WASTE AREA AT 867+25,

1 PLUS OR MINUS, AND THEN WE INTENDED TO PUT THE SLOPES ON
2 AT THAT POINT SOUTH AND TO THE EAST, THE 2:1 SLOPE, AND
3 THEN CARRY THE WASTE BACK IN. THAT WAS THE WAY IT WAS STAKED
4 OR INTENDED TO BE.

5 Q THAT'S TWO DIFFERENT THINGS. IS THAT THE WAY
6 IT WAS ACTUALLY STAKED, THE WAY YOU'VE JUST DESCRIBED IT,
7 OR IS THAT THE WAY YOU WANTED IT TO BE STAKED?

8 A THAT WAS THE INTENT OF THE STAKING WAS TO STAKE
9 IT THAT WAY.

10 Q IS THAT THE WAY IT WAS ACTUALLY STAKED?

11 A I BELIEVE SO. WITHIN--THE PROBLEM WE HAVE IS
12 STAKING AN INTERSECTION OF A PLANE IN TWO DIRECTIONS WITH
13 THE STAKE THAT IS REFERRING TO A STAKE OFF IN THIS AREA--
14 I'M POINTING DOWN KIND OF STRAIGHT DOWN FROM THE ROAD--
15 REPRESENTING A PLANE, SLOPING TO THE WEST AT THE SAME TIME
16 A STAKE HERE IS REFERRING TO A DIRECTION OFF THIS WAY.

17 Q LET'S TRY AND CLARIFY THAT.

18 A I'M TRYING TO FIGURE OUT HOW TO EXPLAIN THAT.

19 Q IF, AS YOU SAY--

20 MR. FORD: FOR THE RECORD, WHAT ARE YOU REFERRING
21 TO?

22 MR. BABCOCK: WE'RE LOOKING AT PHOTOGRAPH 33-D.

23 Q (BY MR. BABCOCK) IF YOU WERE LOOKING AT THE
24 AREA THAT'S GOING TO BE DAYLIGHTED--

25 A YES, SIR.

1 Q --THE END OF WHICH WAS ABOUT 867; IS THAT RIGHT?
2 A 867 PLUS--
3 JUDGE YOUNG: THE EAST END OF WHICH?
4 THE WITNESS: THE EAST END OF WHICH?
5 MR. BABCOCK: YES.
6 Q (BY MR. BABCOCK) 867+25 VERSUS--
7 A I THINK WE TOOK A CROSS SECTION AT 867+32 IS
8 THE MAIN BREAK.
9 Q OKAY. NOW, IF AS YOU SAY, YOU WERE GOING TO
10 STAKE A 2:1 SLOPE FROM 867, THE 2:1 SLOPE WOULD COME OFF
11 OF THIS FACE TO THE EAST, WOULD IT NOT?
12 A IT WENT TO THE EAST, YES, AND THEN YOU HAD SOUTH
13 ALSO AT THE END OF THE DAYLIGHT.
14 Q ALL RIGHT. NOW, I'M FOCUSING IN STATIONS
15 INCREASING TO THE EAST.
16 A YES.
17 Q IF YOU WERE STAKING, AS YOU TESTIFIED THAT THE
18 INTENT WAS THAT YOU WERE STAKING A 2:1 SLOPE OFF THAT, THE
19 END OF THE DAYLIGHT AREA--
20 A YES.
21 Q --THE STAKES WOULD RUN PARALLEL, IF YOU WILL,
22 TO SOME DEGREE, TO THE ROADWAY EXCAVATION AND THE PERPEN-
23 DICULAR, TO SOME DEGREE, TO THE EXISTING EASTERLY END OF
24 THE CUT SECTION IF YOU'RE GOING TO ESTABLISH A 2:1 SLOPE.
25 COME OFF OF 867 TO THE EAST IT'S GOING TO RUN, AS BEST I

1 A YES.

2 Q YOU WOULDN'T CONCLUDE THAT THAT INFORMATION IS
3 IRRELEVANT, WOULD YOU?

4 A THAT IT'S IRRELEVANT? NO, I WOULDN'T TAKE IT
5 AS IRRELEVANT.

6 Q YOU WOULD TAKE IT THAT THERE'S MEANING, THAT
7 A CONTRACTOR COULD DERIVE MEANING FROM THAT INFORMATION.

8 A YES.

9 Q HAVE YOU EVER HAD ANY EXPERIENCE IN ESTIMATING
10 CONSTRUCTION WORK?

11 A NO, SIR.

12 Q EVER OPERATED A SCRAPER OR DOZER?

13 A NO, SIR, I HAVEN'T.

14 Q IN FACT, I THINK YOU INDICATED YOU REALLY WEREN'T
15 FAMILIAR WITH THE OPERATION, METHODOLOGY, IF YOU WILL, THAT
16 PROCON UNDERTOOK AS THEY STARTED WORKING ON THIS PROJECT
17 USING A BACKHOE WITH A DJB TYPE TRUCK.

18 A NO, I WAS NOT FAMILIAR AT THAT TIME.

19 Q THE ONLY OPERATION AND PROCEDURES YOU WERE
20 FAMILIAR WITH WERE SCRAPER OPERATIONS.

21 A AND ROCK TRUCKS ON FLATER PROJECTS BUT NOTHING
22 IN THIS TYPE OF TERRAIN OTHER THAN SCRAPER AND DOZER.

23 Q NOW, DID YOU BELIEVE THIS PROJECT WOULD NEED
24 TO BE SHOT?

25 A I BEG YOUR PARDON?

1 Q DID YOU BELIEVE THAT THERE WOULD NEED TO BE
2 BLASTING ON THIS PROJECT?
3 A I DIDN'T BELIEVE SO.
4 Q DO YOU STILL BELIEVE THAT IT WOULDN'T HAVE BEEN
5 NECESSARY IF THEY'D USED A D9?
6 A THAT'S MY OPINION.
7 Q SIMPLY BASED UPON YOUR EXPERIENCE OBSERVING OTHER
8 CONTRACTORS DO WORK?
9 A AND THE EXPERIENCE OF THE WORK IN THIS CUT
10 ORIGINALLY.
11 Q NOW, YOU INDICATED YOU HEARD THE DRILLER, YOU
12 WENT OUT WITH THE DRILLER AND THE DRILLER SAID, YESTERDAY
13 I COULDN'T DRILL IT, TODAY I CAN'T PICK IT UP.
14 A YES, SIR.
15 Q BECAUSE OF THE RAIN. DID YOU BELIEVE THE DRILLER
16 THAT YESTERDAY HE COULDN'T DRILL IT?
17 A YES, SIR.
18 Q BUT YOU THINK IT COULD HAVE BEEN RIPPED?
19 A I BELIEVE SO.
20 Q SO HE COULDN'T RIP IT BUT A DOZER COULD HAVE
21 RIPPED IT.
22 A I'M NOT A DRILLER EITHER, BUT THE EXPERIENCE
23 IS THAT THAT MATERIAL, THAT MATERIAL ABSORBS A LOT OF ENERGY
24 IN EITHER BLASTING OR DRILLING, SO IT'S VERY HARD TO DO
25 THOSE OPERATIONS ON IT. BUT THE RIPPING HAS BEEN MORE

1 SUCCESSFUL.

2 Q DO YOU HAVE EXPERIENCE WITH BLASTING COMPANIES,
3 PEOPLE NORMALLY BLAST MATERIAL THAT COULD BE RIPPED?

4 A DEPENDS ON THE CONTRACTORS' OPERATION BUT NORMALLY
5 THEY DON'T, BUT THERE'S TIMES THEY CHOOSE TO DO SO FOR
6 VARIOUS REASONS.

7 Q YOU'VE HEARD DISCUSSION AND TESTIMONY ABOUT THE
8 DIFFERENCES BETWEEN D9'S IN 1970 AND FOR PROJECTS BUILT
9 IN 1970 WHICH OBVIOUSLY WOULD MEAN D9'S WERE MANUFACTURED
10 BEFORE THAT, VERSUS EQUIPMENT IN THE MID-1980'S, PARTICULARLY
11 '86, FOR THIS PROJECT. DO YOU HAVE ANY EXPERIENCE IN BEING
12 ABLE TO COMPARE THE EFFECTIVENESS OF THE TYPES OF MACHINES
13 IN THOSE TWO VINTAGES?

14 A NO, SIR. I CAN'T RELATE THEM AS FAR AS DOING
15 THE SAME WORK.

16 Q BUT YOU WOULD HAVE THOUGHT THAT IT'S YOUR OPINION
17 THAT IF PROCON HAD HAD A D9 OF THE MID-1980 VINTAGE IT COULD
18 HAVE RIPPED THE MATERIAL IN THIS AREA?

19 A THAT'S MY OPINION, YES, SIR.

20 Q AND YOU DON'T KNOW WHETHER OR NOT THAT'S THE
21 SAME KIND OF A D9 THAT FIFE WOULD HAVE BEEN USING IN THE
22 1970 PROJECT?

23 A I'M SURE THE 1970 WAS AN EARLIER MODEL, BUT I
24 DON'T KNOW HORSEPOWER COMPARISONS. THEY NEVER STATED
25 THAT OR ANYTHING.

1 Q SO YOU DON'T KNOW THE HORSEPOWER COMPARISONS
2 OF THE KOMATSU 155 COMPARED TO THE D9'S THAT WERE USED BY
3 FIFE?

4 A OTHER THAN WHAT'S BEEN DISCUSSED IN THE COURT-
5 ROOM, NO, SIR.

6 Q BUT YOU'VE HEARD TESTIMONY THOSE WERE FAIRLY
7 COMPARABLE TYPE MACHINES.

8 A I'VE HEARD THAT.

9 Q COMPARATIVE VINTAGES.

10 A I'VE HEARD THAT TESTIMONY.

11 Q YOU DON'T HAVE ANY REASON TO DISBELIEVE OR BELIEVE
12 THAT, I GUESS?

13 A NO, NO OPINION, SIR.

14 Q BY THE WAY, WE'VE TALKED ABOUT THIS 2:1 SLOPE
15 IN THE WASTE AREA. CAN YOU POINT OUT WHERE THAT'S CALLED
16 OUT IN THE PLANS OR SPECIFICATIONS THAT YOU HAVE TO MAINTAIN
17 2:1 SLOPES?

18 A THE TYPICAL SECTION SAYS 2:1 SLOPE ON ALL FILLS.
19 ON TYPICAL NO. 1, SHEET 2, ON THE RIGHT-HAND SIDE IT SAYS,
20 2:1 OVER FIVE FOOT IN FILLS.

21 Q IS TYPICAL 1 REFLECTIVE OF WASTE OR EMBANKMENT?

22 A EITHER. IS MY UNDERSTANDING.

23 Q SO YOUR UNDERSTANDING OF THAT--

24 A IT'S A FILL BEING PLACED ON THE JOB SO IT WOULD
25 BE APPLICABLE ON THIS PROJECT EITHER THE WASTE OR THE

1 EMBANKMENT. THAT WOULD BE ON THE LEFT. I SAID THAT WRONG.

2 Q IT'S TYPICAL NO. 1 ON THE LEFT WHERE IT SAYS
3 2:1 OVER FIVE FOOT FILLS. IS THAT CORRECT, MR. KIRKHAM?

4 A YES, THAT IS.

5 JUDGE YOUNG: AND THE OTHER ON THE RIGHT IS 2:1
6 UNDER FIVE FOOT CUTS.

7 Q (BY MR. BABCOCK) IT'S ACTUALLY SHOWN ON AN
8 EMBANKMENT CROSS SECTION, ISN'T IT? ISN'T THAT WHAT TYPICAL
9 NO. 1 IS, THROUGH AN EMBANKMENT UPPER CUT AND THE FILL OFF
10 THE SIDE OF THE EMBANKMENT?

11 A YES, IT'S THE TYPICAL SECTION FOR THE PROJECT.

12 Q IS WASTE MATERIAL PLACED IN A TYPICAL SECTION
13 AREA?

14 A IT DOESN'T INDICATE IT BUT ON THIS PROJECT IT
15 WAS TO BE PART OF THE CONSTRUCTION SO IT WAS APPLICABLE
16 TO THAT.

17 Q DID YOU WRITE ANY LETTERS TO PROCON DURING THE
18 COURSE OF THE PROJECT?

19 A YES.

20 Q WHAT LETTERS DID YOU WRITE TO THEM?

21 A I DON'T RECALL ALL OF THEM, SIR.

22 Q DID YOU RESPOND IN WRITING TO ANY OF THE REQUESTS
23 THEY MADE FOR TIME EXTENSIONS?

24 A NO.

25 Q DID YOU WRITE A RESPONSE TO THEM ABOUT THEIR

1 REQUESTS FOR COMPENSATION ON BLASTING OR OTHER IMPACTS?

2 A I DON'T RECALL WRITING ON THOSE, NO, SIR.

3 Q IT'S YOUR OPINION, YOU'VE TESTIFIED, THAT YOU
4 DON'T BELIEVE THAT THERE WAS ANY CHANGE IN THE WASTE AREA
5 EFFECTIVELY. IS THAT A--

6 A WHEN WE DISCUSSED PREVIOUS TO THIS THAT WAS MY
7 OPINION BECAUSE WE HAD SLOPED FROM THE BEGINNING OF THE
8 WASTE AREA.

9 Q AND YOU SAY YOU NEVER RECEIVED EXHIBIT 18.

10 A NO, SIR, I DIDN'T.

11 Q I SUPPOSE, EVEN IF YOU HAD RECEIVED IT YOU
12 WOULDN'T HAVE AGREED WITH IT AT THE TIME BECAUSE YOU DIDN'T
13 BELIEVE THERE'D BEEN ANY CHANGE ANYWAY IN THE WASTE AREA.

14 A THAT'S PROBABLY CORRECT, SIR.

15 Q YOU'D HAVE HAD TO SAY, THINK ABOUT THAT, AS TO
16 THE BLASTING, THAT THERE REALLY WASN'T A CHANGE AND YOU
17 REJECT THE REQUEST.

18 A THAT'S CORRECT, SIR.

19 Q AND YOU WOULDN'T HAVE DONE ANYTHING ANY DIFFER-
20 ENTLY IF YOU GOT THAT LETTER IN APRIL OF '86 THAN WHAT YOU
21 DID DO BECAUSE YOU DIDN'T BELIEVE WHAT WAS SAID IN THE
22 LETTER.

23 MR. FORD: WELL, I THINK THAT'S REMOTELY SPECU-
24 LATIVE.

25 JUDGE YOUNG: THE OBJECTION IS SUSTAINED.

1 Q (BY MR. BABCOCK) DO YOU NORMALLY GET ASSIGNED
2 TO THE PROJECT AS A PROJECT ENGINEER MORE THAN TWO WEEKS
3 BEFORE THE PROJECTS GOES TO BID?

4 A NOT NORMALLY.

5 Q SO THERE'S USUALLY A RUSH AT THE END TO TRY TO
6 GET READY FOR THE PROJECT GOING TO BID?

7 A YES, SIR.

8 Q YOU'RE NOT SURE THAT ALL OF THE BIDDERS ACTUALLY
9 VISITED THE BID SITE?

10 A I'M NOT SURE.

11 JUDGE YOUNG: WHAT IS THE RELEVANCE OF THAT?
12 WHAT DO I CARE WHETHER ALL OF THEM SAW IT?

13 MR. BABCOCK: WELL, WE'RE GOING BACK TO THIS
14 ISSUE OF VERBAL NOTIFICATION AND OF CHANGES.

15 JUDGE YOUNG: LET'S TRY TO REALLY FOCUS ON THE
16 FACTS THAT WILL BE IMPORTANT FOR ME TO DECIDE.

17 Q (BY MR. BABCOCK) YOU INDICATED ON YOUR EARLIER
18 TESTIMONY THAT THERE WAS--YOU DIDN'T THINK THERE WAS ANY
19 MORE DIFFICULTY IN PLACING THE MATERIAL, WASTE MATERIAL
20 TO THE EAST THAN THERE WAS IN PLACING THE WASTE MATERIAL
21 TO THE--WOULD HAVE BEEN TO PLACE THE WASTE MATERIAL TO THE
22 SOUTH.

23 A THAT'S CORRECT. THE TERRAIN WAS SIMILAR.

24 Q BUT I GUESS, BASED ON AN EARLIER RESPONSE, YOU
25 WOULD NOW AGREE, THOUGH, THAT IT WAS AT LEAST FURTHER AWAY,

1 IT HAD TO BE HAULED, MOVED FURTHER.

2 A YES.

3 Q IT'S YOUR OPINION THAT IS IDENTICAL IN THOSE
4 TWO AREAS, THAT IS, IN THE DESIGNATED WASTE AREA TO THE
5 SOUTH AND AS YOU STAKED IT TO THE EAST.

6 A I'M NOT SURE WHAT RANGE OF IDENTICAL THEY ARE.
7 THEY ARE BOTH IN EXCESS OF 150 FEET.

8 Q OKAY. THROUGH THE ENTIRE AREAS, AWAY FROM THE
9 EXISTING--

10 A NO.

11 Q --FILL?

12 A NO, THERE IS A SLOPE THERE, SO AT THE MAXIMUM
13 DEPTH.

14 Q THEY MAX OUT ABOUT THE SAME?

15 A YES.

16 Q BETWEEN THE EXISTING TERRAIN AND THE MAXIMUM
17 DEPTH IS THE TERRAIN BASICALLY THE SAME, IN YOUR OPINION?

18 A THE ORIGINAL GROUND IN BOTH DIRECTIONS WAS VERY
19 SIMILAR.

20 Q AND THE COVING AND THE TERRAIN KNOBS, AND WHATEVER
21 THOSE WERE, WERE BASICALLY SIMILAR AS WELL?

22 A YES, SIR.

23 Q AS TO YOUR TESTIMONY THAT PROCON IS, IN YOUR
24 OPINION, ENTITLED TO MORE TIME, YOU SAID YOU COULDN'T EXPRESS
25 AN OPINION PRECISELY HOW MUCH TIME. WOULD IT APPROACH THE

1 AMOUNT OF TIME THAT THEY ACTUALLY SPENT ON THE JOB THAT
2 YOU FELT THAT THEY WOULD BE ENTITLED TO TIME FOR PERFORMANCE
3 OF THE WORK?

4 JUDGE YOUNG: IS THERE A QUESTION?

5 MR. BABCOCK: WOULD IT APPROACH THAT AMOUNT OF
6 TIME. HE JUST SAID HE WASN'T SURE AND I'M TRYING TO GET
7 A RANGE, IF I CAN.

8 THE WITNESS: IT WOULD BE VERY DIFFICULT TO GIVE
9 YOU A RANGE BEYOND THE TIME.

10 Q (BY MR. BABCOCK) MORE THAN 60 DAYS?

11 A 60 DAYS WOULD BE A STARTING POINT, I FEEL, TO
12 LOOK AT FOR RELEVANCE ON IT.

13 Q AND IT COULD BE MORE?

14 (WHEREUPON, THE WITNESS NODS HIS HEAD IN THE
15 AFFIRMATIVE).

16 JUDGE YOUNG: ANSWER AUDIBLY.

17 THE WITNESS: YOU'D HAVE TO LOOK AT--YES, MIGHT
18 BE MORE, JUSTIFY MORE OR LESS FROM THAT. THAT WOULD BE
19 A POINT I WOULD CONSIDER STARTING AT.

20 JUDGE YOUNG: KNOWING THAT PROCON WAS ON THE
21 JOB FOR 161 DAYS DO YOU KNOW OF ANY REASON WHY THAT AMOUNT
22 OF TIME WAS NOT REQUIRED AS A RESULT OF THE TERRAIN? IN
23 OTHER WORDS, IT WAS--WAS ANY OF THAT TIME LIKELY WASTED
24 TIME AS A RESULT OF INEFFICIENT WORK?

25 A IN MY OPINION THERE WAS SOME OF THAT THAT WAS

1 WASTED TIME BECAUSE OF THE METHODS AND BREAKDOWN OF EQUIP-
2 MENT AND THAT.

3 JUDGE YOUNG: WOULD THAT BE A RELATIVELY MINOR
4 FACTOR COMPARED TO THE IMPACT OF THE TOPOGRAPHY?

5 THE WITNESS: THAT'S THE TYPE OF THING I'D HAVE
6 TO LOOK AT.

7 JUDGE YOUNG: DO YOU HAVE AN OPINION ON THAT?

8 THE WITNESS: NOT AT THIS TIME, SIR. I JUST
9 DON'T RECALL IT. I DON'T KNOW.

10 Q (BY MR. BABCOCK) IT'S YOUR UNDERSTANDING THERE
11 WAS SOMEWHAT OF A PUSH TO TRY TO GET THIS PROJECT OUT BECAUSE
12 OF SPECIAL FUNDS BEING MADE AVAILABLE.

13 A THAT'S MY UNDERSTANDING, YES, SIR.

14 Q IT HAD BEEN KIND OF SITTING AROUND FOR A WHILE
15 BUT EMERGENCY FUNDS BECAME AVAILABLE SO THERE WAS A PUSH
16 TO GET THE PROJECT OUT.

17 A I'M NOT SURE WHAT YOU MEAN BY "SITTING AROUND."

18 Q OR THE CONCEPT TO DO SOMETHING IN CLAY HILLS
19 PASS HAD BEEN DISCUSSED FOR A WHILE.

20 A YES. MAINTENANCE HAD BEEN DISCUSSING AND DEALING
21 WITH THE PROBLEM FOR SOME TIME AND I DON'T KNOW WHEN THE
22 DECISION, OTHER THAN WHEN WE WERE ASKED TO SUPPLY THE
23 ORIGINAL CROSS SECTIONS FOR IT, ACTUALLY BEGAN SERIOUS
24 CONSIDERATION.

25 Q ARE YOU SURE YOU DISCUSSED D9'S AT THE PROCON

1 SITE VISIT OR ARE YOU NOT POSITIVE YOU DISCUSSED ACTUALLY
2 WHAT IT WAS THAT FIFE USED?

3 A I REMEMBER SPECIFICALLY MAKING A POINT TO MENTION
4 D9'S, THAT THAT'S WHAT THEY USED WAS THE D9'S.

5 Q I ASKED YOU ABOUT THIS YESTERDAY--

6 JUDGE YOUNG: HOW MUCH MORE TIME DO YOU ANTICI-
7 PATE WITH THIS WITNESS?

8 MR. BABCOCK: A FEW MORE MINUTES. I WOULDN'T
9 THINK MAYBE MORE THAN 15 MINUTES.

10 JUDGE YOUNG: WHY DON'T YOU SEE IF YOU CAN SHORTEN
11 THAT AND LET'S TAKE CARE OF THAT BEFORE WE BREAK FOR LUNCH.

12 MR. BABCOCK: OKAY. EITHER I OR THE COURT ASKED
13 YOU A QUESTION ABOUT BUTTRESSING OF THE FILL.

14 A (BY THE WITNESS) YES, SIR.

15 Q (BY MR. BABCOCK) DO YOU RECALL DISCUSSING THAT
16 PRIOR TO BIDDING, THE CONCEPT OF BUTTRESSING THE FILL WITH
17 THE WASTE?

18 A I DON'T RECALL THAT PRIOR TO BIDDING AS A DEFINING
19 IT AS A BUTTRESS.

20 Q ISN'T THAT WHAT WE TALKED ABOUT IN YOUR DEPO-
21 SITION?

22 A WE DISCUSSED IT IN THE DEPOSITION.

23 JUDGE YOUNG: WHY DON'T YOU JUST ASK THE QUES-
24 TIONS YOU'RE CONCERNED WITH, MR. BABCOCK, RATHER THAN WHETHER
25 YOU DISCUSSED IT IN THE DEPOSITION. ASK THE QUESTION NOW.

1 IF YOU ARE GOING TO USE THE DEPOSITION FOR IMPEACHMENT THEN
2 GET THE BASIC FACT THAT YOU WISH TO IMPEACH ON IN EVIDENCE.

3 Q (BY MR. BABCOCK) YOU DON'T RECALL SAYING THAT
4 YOU DISCUSSED THE NEED TO BUTTRESS THE AREA WITH ARCHIE
5 HAMILTON AND FRANK ULRICH BEFORE THE BIDDING?

6 A I THINK BUTTRESS IS THE TERM THAT'S COME UP HERE
7 IN QUESTIONS. WE USE THE TERM BUTTRESS, MEANING TO PUT
8 SOME MASS OF MATERIAL DOWN ON THE SLOPES AND TO PUT THE
9 FILL IN THERE.

10 Q THERE WAS A PURPOSE YOU DISCUSSED WITH THEM PRIOR
11 TO BIDDING TO STABILIZING THE AREA.

12 A YES.

13 Q AND THAT THE PURPOSE, ONE OF THE PURPOSES OF
14 THE WASTE WAS TO, AT LEAST THE INTENTION OF THE FOLKS AT
15 U.D.O.T. WAS TO USE IT TO STABILIZE THE FILL AREA, THE SLOPE
16 AREA.

17 A THE SOUTHERLY--THAT AREA THAT WAS ADJACENT TO
18 THE SLIDE ON THE OTHER SIDE, IN THAT AREA.

19 Q AND IF THE MATERIAL HAD BEEN PLACED, AS IT WAS
20 SHOWN, STARTING AT 864 IN THE WASTE, ASSUMING THE WASTE
21 AREA HAD RUN OUT ABOUT 867, IT WOULDN'T HAVE ACCOMPLISHED
22 THAT SUPPORTING AND STABILIZING AND THE CONCEPT THAT U.D.O.T.
23 HAD THAT INTENT TO TRY TO USE IT TO STABILIZE THE FILL AND
24 SLOPE AREA.

25 A I'M NOT SURE I UNDERSTOOD YOUR QUESTION. ARE

1 YOU SAYING IT WOULD HAVE OR IT WOULD NOT HAVE?

2 Q IT WOULD NOT HAVE ACCOMPLISHED THE GOAL OF THAT
3 BUTTRESSING, STABILIZING, WHATEVER IT WAS THAT YOU SAY THE
4 INTENT WAS.

5 A I THINK IT WOULD HAVE HAD THE EFFECT OF DOING
6 THAT ON THAT SIDE AS WELL AS OFF THE EASTERLY SIDE WHERE
7 IT IS OFF THAT POINT.

8 JUDGE YOUNG: I THINK, IF I UNDERSTAND YOUR TESTI-
9 MONY, IT HAS JUST BEEN YOU WERE CONCERNED ABOUT BUTTRESSING,
10 IF AT ALL, ON THE SIDE OF THE SLIDE, WHICH IS ON THE OTHER
11 SIDE OF THE ROAD.

12 THE WITNESS: OPPOSITE THE SIDE OF THE SLIDE.

13 JUDGE YOUNG: OPPOSITE. OH, OKAY. I DIDN'T
14 HEAR YOU SAY THAT.

15 THE WITNESS: SO THE POTENTIAL FOR THE SLIDE
16 TO THE SOUTH WAS REDUCED.

17 JUDGE YOUNG: OKAY. IF YOU HAD PUT THE WASTE
18 IN THE ORIGINAL DESIGNATED WASTE AREA, OTHER THAN ENVIRON-
19 MENTAL IMPACT OR OTHER IMPACTS, IT WOULDN'T MATTER A BIT
20 IF IT HAD SLID, IF IT HAD NOT BEEN BUTTRESSED OR HAD SLID
21 OUT JUST INTO THAT RAVINE, THAT WOULD NOT HAVE AFFECTED
22 THE ROADWAY IN ANY RESPECT, WOULD IT?

23 THE WITNESS: YOU MEAN IF THE WASTE SLIPPED?

24 JUDGE YOUNG: YEAH, IF YOU PUT THE WASTE IN THE
25 ORIGINAL WASTE DESIGNATED AREA FROM ABOUT 864 ON UP. YOU

1 ALREADY HAD A WHOLE MOUNTAIN, IN EFFECT, TO PROTECT THE
2 ROAD, AND ANY SLIPPAGE OF THAT WASTE WOULD NOT HAVE HAD
3 ANY IMPACT, WOULD IT?

4 THE WITNESS: I DON'T THINK WE WERE CONCERNED
5 ABOUT THE WASTE SLIPPING.

6 JUDGE YOUNG: YEAH, I WOULDN'T THINK SO EITHER.
7 I DON'T SEE WHY.

8 THE WITNESS: NO, NOT THE WASTE SLIPPING.

9 JUDGE YOUNG: OKAY.

10 Q (BY MR. BABCOCK) BUT IF THE WASTE HAD BEEN PLACED
11 IN THE ORIGINAL DESIGNATED WASTE AREA IT WOULD NOT HAVE
12 GIVEN THE KIND OF STABILIZATION THAT U.D.O.T. OBTAINED BY
13 PLACING IT WHERE IT WAS ACTUALLY STAKED.

14 JUDGE YOUNG: THAT'S OBVIOUS.

15 THE WITNESS: YEAH. IF I CAN GET CLEAR IN MY
16 MIND WHAT YOU JUST SAID, BUT THAT IS CORRECT.

17 Q (BY MR. BABCOCK) WHERE YOU STAKE IT WAS MORE
18 INTENDED WITH WHAT THE PLAN U.D.O.T. HAD FOR STABILIZATION
19 PURPOSES IF IT HAD BEEN STAKED IN THE DESIGNATED WASTE AREA.

20 A AS I UNDERSTOOD IT THAT WOULD PROBABLY BE THE
21 EFFECT, YES, SIR.

22 Q NOW, WHEN YOU STAKED THE WASTED FILL AREA DID
23 YOU ASSUME THAT THERE WOULD BE A NET BALANCING OF SHRINK
24 AND SWELL?

25 A YES.

1 Q IT'S YOUR OPINION--

2 A WE STAKED IT BASED ON THE 1:1 FACTOR OF ONE YARD
3 OF EXTRA WOULD MAKE ONE YARD OF FILL WITH THE ALLOWANCE,
4 SHOULD THERE BE SHRINK TO EXPAND THE WASTE AREA OR, I MEAN,
5 IF THERE WAS A SWELL TO EXPAND THE WASTE AREA. SHRINK,
6 WE HAVE BENCHED.

7 MR. BABCOCK: IF I MIGHT HAVE JUST A MOMENT?

8 JUDGE YOUNG: YOU MAY.

9 MR. BABCOCK: NOTHING FURTHER.

10 JUDGE YOUNG: THANK YOU. ANYTHING FURTHER OF
11 THIS WITNESS?

12 MR. FORD: JUST A COUPLE OF QUESTIONS.

13

14 REDIRECT EXAMINATION

15 BY MR. FORD:

16 Q NOW, YOU BEGAN THE PLACEMENT OF THE SLOPE, OR
17 THE FILL--FOR THE WASTE FILL ADJACENT TO THE EMBANKMENT
18 SECTION THAT WAS BEING BUILT; IS THAT CORRECT?

19 A YES, SIR.

20 Q THE CONTRACTOR HAD TO GO DOWN TO BEGIN BUILDING
21 THE EMBANKMENT FILL AND BRING THAT UP.

22 A YES, SIR.

23 Q SO IN YOUR MIND WAS IT LOGICAL TO START THE WASTE
24 FILL THERE TOO SINCE HE ALREADY HAD TO GO DOWN FOR THE
25 EMBANKMENT?

1 A YES.

2 Q IS THAT THE REASON YOU CHOSE TO START THERE?

3 A WHY HE CHOSE TO START THERE?

4 Q WHY YOU CHOSE TO START THERE.

5 A I DIDN'T CHOOSE WHERE TO START.

6 Q NO, START AT THE PLACEMENT OF THE SLOPE.

7 A OH, THE SLOPE? THAT WAS WHERE I PERCEIVED TO

8 BE THE CRITICAL AREA TO PUT THE MATERIAL AND THAT'S WHY

9 WE STARTED STAKING IT IN THAT AREA.

10 Q NOW, THE CENTERLINE PROFILE THAT'S BEEN TALKED

11 ABOUT THAT WE REALLY FREELY ADMIT IS IN ERROR, THE GRADE

12 LINE ON THAT, THE GRADE FOR THE ROAD, IT DOESN'T CHANGE,

13 DOES IT?

14 A NO.

15 Q SO IT'S NOT AN ERROR AS FAR AS THAT LINE IS

16 CONCERNED.

17 JUDGE YOUNG: MR. FORD, ARE YOU TESTING ME ON

18 LEADING QUESTIONS?

19 MR. FORD: IF HE DOESN'T OBJECT, I'M GOING TO

20 GET THROUGH IT.

21 MR. BABCOCK: THEY'VE ACKNOWLEDGED THE CENTERLINE

22 PROFILE IS IN ERROR. WE TOOK QUITE A WHILE BUT . . .

23 JUDGE YOUNG: GO AHEAD. PROCEED.

24 Q (BY MR. FORD) WELL, IS IT FAIR TO SAY THAT AT

25 THE TIME OF YOUR DEPOSITION THAT'S THE FIRST TIME YOU EVER

1 LOOKED AT THE CENTERLINE PROFILE FOR THIS JOB?

2 A I'VE SEEN IT BEFORE BUT HADN'T PAID ATTENTION

3 AS FAR AS BEING THE CENTERLINE OF THE ROAD, NO, SIR.

4 Q HAD NO RELEVANCE, DID IT?

5 A NOT FOR WHAT WE WERE DOING, NO, SIR.

6 Q WAS THE MATERIAL THAT PROCON ENCOUNTERED IN THEIR

7 PROJECT ANY DIFFERENT FROM THE MATERIAL THAT WAS ENCOUNTERED

8 BY FIFE BASED ON YOUR--

9 A NOT AS I RECALL IT.

10 MR. FORD: THANK YOU.

11 JUDGE YOUNG: THANK YOU. ANYTHING FURTHER OF

12 THIS WITNESS?

13 THANK YOU, MR. KIRKHAM. YOU MAY STEP DOWN.

14 WE WILL TAKE OUR NOON RECESS AT THIS TIME.

15 (RECESS).

16

17 JUDGE YOUNG: PLEASE CONTINUE.

18 MR. FORD: I CALL ALBERT SPENSKO.

19

20

21

22

23

24

25

Tab 16

1 22ND OF APRIL, AND GOES ON, BUT OVER HERE, STARTING THE
2 FIRST PART OF MAY, IT TAILS OFF QUITE DRAMATICALLY INTO
3 THIS MID-PART OF MAY.

4 CAN YOU TELL US WHAT HAPPENED DURING THAT PERIOD
5 OF TIME?

6 A WHICH PART, OF MAY OR APRIL?

7 Q STARTING ABOUT THE FIRST OF MAY. FROM THERE
8 UNTIL THE 21ST OF MAY THERE'S WHAT LOOKS LIKE A PERIOD WHERE
9 THE PRODUCTION ISN'T VERY HIGH.

10 A THERE WERE BACKHOES LOADING, ONE, ON THE FIRST
11 OF MAY, THEY HAD ONE TRUCK HAULING AND THE BACKHOE WAS
12 LOADING THIS TRUCK AND PUSHING A ROAD DOWN INTO THE FILL
13 AREA AND THEY HAD TO BUILD A ROAD DOWN THROUGH THIS MATERIAL.
14 THEY PUSHED OFF FOR THAT THREE WEEKS. THEY HAD TO BUILD
15 A ROAD DOWN THROUGH THAT ON SWITCH BACKS TO GET INTO WHERE
16 THE MATERIAL SHOULD GO. AND THEY WERE STARTING HAULING
17 WITH ONE TRUCK AT THAT PARTICULAR TIME THROUGH THE YARDAGE--

18 Q NOW THE PRODUCTION PICKS UP NEAR THE END OF MAY.
19 CAN YOU TELL US WHAT OCCURRED IN THAT TIMEFRAME?

20 A THEY PROBABLY--ABOUT THAT TIME THEY BROUGHT THE
21 LOADER IN AND WERE LOADING THE TRUCKS FASTER THAN THE BACKHOE
22 WAS WORKING, AND THE TRUCKS WERE HAULING DOWN INTO THE
23 BOTTOM.

24 Q OKAY. AND DID THAT OPERATION LIKE THAT CONTINUE
25 ON THROUGH JUNE AND INTO JULY?

1 A YES.

2 Q DID I ASK ABOUT SOME SPECIFIC DATES? REFER TO
3 PAGE 22 OF YOUR DIARY.

4 A OKAY.

5 Q HAVING REFRESHED YOUR RECOLLECTION CAN YOU TELL
6 US WHAT OCCURRED ON THAT DATE THAT WAS SIGNIFICANT?

7 A BACKHOE WORKING ON TOP OF THE CUT, SCRAPING THE
8 MATERIAL DOWN; DOZER IS RIPPING AND PUSHING AHEAD FROM THE
9 STATION 864 AND TRIED TO MAKE A ROAD UP TO THE MATERIAL;
10 THE BACKHOE WOULD SCRAPE DOWN OFF THE TOP OF THE CUT AND
11 THE TRUCK, IT WAS TOO STEEP SO HE PUSHED IT UP WITH A DOZER
12 AND LOADED IT WITH THE BACKHOE AND THEN THE TRUCK WENT DOWN
13 TO THE BOTTOM TO EMPTY HIS LOAD.

14 Q WERE THEY ABLE TO DO THAT SUCCESSFULLY?

15 A NO, IT WAS SO STEEP THE TRUCK COULDN'T GET UP
16 WITHOUT BEING PUSHED UP BY A PIECE OF MACHINERY, A CATER-
17 PILLAR. AND IT WAS REALLY STEEP COMING DOWN FOR THE TRUCKS,
18 WAS KIND OF, BRAKE-WISE, THE LOAD ON IT WAS KIND OF SCAREY.

19 Q HAD YOU OBSERVED AN OPERATION--

20 JUDGE YOUNG: WHAT WAS THE DATE OF THAT, INCI-
21 DENTALLY?

22 THE WITNESS: THE 15TH OF APRIL, '86.

23 JUDGE YOUNG: THANK YOU.

24 Q (BY MR. FORD) NOW, HAD YOU OBSERVED AN OPERATION
25 SIMILAR TO THE OPERATION THAT PROCON USED DOWN THERE BEFORE?

1 A ON A PROJECT UP AT THE HITE AREA WE--THERE WAS
2 AN OPERATION WHERE THEY DOZED THE MATERIAL OFF AND THEY
3 GOT A ROAD DOWN THROUGH IT. AND THE SCRAPER--AT THAT TIME
4 THERE WERE SCRAPERS THAT WOULD GO DOWN WITH A LOAD AND THEN
5 THEY HAD--THE CATS WOULD PUSH THE SCRAPER BACK UP TO THE
6 TOP AND HE'D GET ANOTHER LOAD AND GO DOWN AND JUST MAKE
7 THE ROUND TRIP WITH THAT BEING PUSHED UP THE HILL. BACK
8 UP EMPTY HE HAD TO BE PUSHED.

9 Q BUT WHAT ABOUT THE PUSHING OF TRUCKS UP AND DOWN?
10 HAD YOU OBSERVED THAT BEFORE?

11 A THIS WAS MY FIRST TIME I WAS AROUND ROCK TRUCKS
12 ON A STEEP GRADE LIKE THIS. FILL AREA.

13 Q WOULD YOU TURN TO THE NEXT DAY AND TELL US WHAT
14 DAY THAT IS?

15 A THE 16TH.

16 Q OF APRIL, 1986?

17 A YES. 16TH OF APRIL.

18 Q DO YOU HAVE A NOTATION THERE CONCERNING HOW MANY
19 TIMES MATERIAL WOULD BE HANDLED?

20 A YES. THEY TRIED TO TAKE THE ROCK TRUCK UP THE
21 GRADE AGAIN, UP THIS CUT. AND IT WAS TOO STEEP, THEN THEY
22 MADE IT AT 3:00 P.M. AND THE BACKHOE WAS WORKING AT THE
23 TOP OF THIS CUT. AND SOME OF THIS MATERIAL WILL BE MOVED
24 THREE OR MORE TIMES BEFORE IT GETS TO THE FILL AREA.

25 Q NOW, YOU MADE A NOTATION OF THAT IN THE DIARY.

1 WHY IS THAT SIGNIFICANT, IN YOUR OPINION?

2 A I DIDN'T THINK IT WAS PROBABLY FEASIBLE TO MOVE
3 THIS DIRT MORE THAN THREE TIMES, OVER THREE TIMES, OR EVEN
4 TWO TIMES, SO I MADE A NOTE WHAT WAS HAPPENING TO THE WORK
5 DAYS, WHY HE WAS TAKING SO LONG TO GET THE DIRT FROM THE
6 TOP TO THE BOTTOM IN THE FILL AREA AND BE COMPACTED.

7 Q REFER TO PAGE 27, PLEASE.

8 A THAT'S APRIL 23RD, 1986.

9 Q DO YOU DESCRIBE THE OPERATION OF THE CONTRACTOR
10 THERE AND, IF SO, WOULD YOU TELL US WHAT?

11 A OKAY. THEY MADE THIS ROAD UP THROUGH THE CUT
12 OVER TO WHERE THE STEEP CUT AREA, TO WHERE THE MATERIAL
13 WAS, AND THEN THIS DAY THEY TOOK THAT ROAD OUT, MOVED IT,
14 HAULED IT OFF. I DON'T KNOW WHY. I ASKED WHY. THEY'RE
15 HAULING IT TO A STATION 870 AND THEN A DOZER PUSHED OFF
16 THE LEDGE TO ANOTHER DOZER WHO PUSHED THE MATERIAL OUT INTO
17 THE FILL AREA IN ONE FOOT LIFTS. THEN IT WAS COMPACTED.

18 Q ON PAGE 30 YOU HAVE A NOTATION, I BELIEVE, CON-
19 CERNING THE BACKHOE UP IN THE FILL AREA. WOULD YOU EXPLAIN
20 THAT?

21 A ON APRIL THE 29TH? DO YOU WANT ME TO COMMENT
22 ON THAT?

23 Q YES, WOULD YOU?

24 A I TALKED TO BILL THOMAS ABOUT THE FILL AREA,
25 PLACING ABOUT 500 YARDS A DAY INTO THE FILL AREA. THE TRUCKS

1 WERE HAULING ABOUT 15 TO 1,800 YARDS AND HAULING IT DOWN
2 AND PILING IT IN A PILE AND THEN THEY WERE PUSHING INTO
3 THE FILL AREA AND COMPACTING IT AFTER THEY HAULED IT DOWN
4 AND--HAD TO MOVE IT DOWN AGAIN AND INTO THE FILL AREA AND
5 COMPACT IT.

6 Q SO WHAT KIND OF PROBLEM WAS THAT CREATING?

7 A IT WAS SLOWING DOWN--THERE WAS MATERIAL BEING
8 MOVED TO THE FIELD BUT THE FILL WASN'T BEING BUILT AS FAST
9 BECAUSE OF THE BAD AREA IT WAS IN, THE FILL WHERE REQUIRED
10 IN WASN'T GETTING THE MATERIAL THAT THEY HAD HAULED TO THE
11 FILL.

12 Q SO WHAT WAS THE PURPOSE OF TALKING TO MR. THOMAS
13 THEN? THE STATE DIDN'T TELL THE CONTRACTOR HOW TO DO WORK,
14 DO WE?

15 A NO. THERE WAS THE MATERIAL THEY DOZED OVER ON
16 THE FIRST THREE WEEKS WOULD FILL TO THE BOTTOM AND THEN
17 THEY HAD TO MOVE THAT MATERIAL BACK OUT AND IN AND COMPACT
18 IT IN ONE INCH LIFTS--OR ONE FOOT LIFTS, PARDON ME--THAT
19 WAS DOZED OFF. IT WAS JUST LOOSE AND THERE WAS BIG ROCKS
20 IN IT AND THEY HAD TO DIG THIS OUT AND GET INTO THE SOLID,
21 ORIGINAL GROUND. I HAD TO TALK TO HIM ABOUT PROBABLY MOVING
22 THAT MATERIAL OUT SO WE COULD MAKE ROOM FOR OUR FILL.

23 Q NOW, MOVING AHEAD TO THE FIRST OF MAY, DID THEY
24 USE THE TRUCKS TO ROLL IN THE FILL AREA TO TRY AND HELP
25 SPEED UP THE OPERATION?

1 A THE TRUCKS ROLLED THE FILL AREA TO GET THE 95
2 PERCENT COMPACTION. AND IT HELPED AT THAT TIME. THEY
3 WEREN'T GETTING COMPACTION WITH THE SHEET FOOT, THE LIFTS
4 WERE PROBABLY TOO THICK AND THEY WERE MORE THAN A FOOT THICK
5 AND WASN'T GETTING THE COMPACTION SO WE ROLLED WITH THE
6 TRUCK TO HELP GET THE COMPACTION.

7 Q LOOK AT PAGE 37, PLEASE.

8 A ON THE 8TH DAY OF MAY, 1986?

9 Q YES. YOU MADE A NOTATION THERE ABOUT PLACING
10 LOOSE MATERIAL.

11 A STARTED PUSHING THE LOOSE PILE OF EXCAVATION
12 868+50 TO FILL 869+50 PUTTING WATER IN TRUCKS, 867+50.

13 Q LET'S PASS THAT ONE AND GO TO PAGE 42.

14 A MAY THE 15TH, 1986.

15 Q HAVE YOU RECORDED ANYTHING IN THERE ABOUT THE
16 TRUCK BREAKING DOWN?

17 A YES. ONE ROCK TRUCK HAULED THREE LOADS OF
18 MATERIAL AND THEN BROKE DOWN, YES.

19 Q WAS THAT A FREQUENT OCCURRENCE ON THE PROJECT?

20 A YES.

21 Q WHAT WAS THE REASON FOR IT, DO YOU KNOW?

22 A NO, I REALLY CAN'T REMEMBER WHY IT BROKE DOWN,
23 BUT I DON'T THINK THERE WAS ONE DAY THAT THE TRUCKS WEREN'T
24 RUNNING ALL TEN HOURS EVERY DAY. I THINK THERE WAS ONE
25 DAY THAT THEY DONE IT. IT WAS ALMOST SOMETHING HAPPENED

1 EVERY DAY.

2 Q DID THEY FINALLY BRING IN A THIRD TRUCK SO THEY
3 WOULD HAVE THE OPPORTUNITY IF ONE BROKE DOWN TO SUBSTITUTE
4 A TRUCK?

5 A YES.

6 Q TURN TO THE NEXT PAGE. I BELIEVE YOU HAVE A
7 NOTATION ABOUT THE DOZER PUSHING MATERIAL OVER THE SLOPE.
8 IS THAT CORRECT?

9 A DOZER PUSHING MATERIAL OVER THE SLOPE, NEED TO
10 MAKE A NEW HAUL ROAD TO FILL 870. DOZERS PUSHING THE DIRT
11 FROM 871 BACK TO 869--FROM 871-879, PUSHING OVER THE EDGE
12 AGAIN.

13 Q DID YOU EVER AT ANY TIME TELL THE CONTRACTOR
14 THAT HE COULDN'T PUSH MATERIAL WITH A DOZER INTO THAT AREA
15 FROM THE DAYLIGHT CUT?

16 A NO, I NEVER DID.

17 Q AND THAT WAS UP TO HIM IF HE WANTED TO DO THAT?

18 A YES. OTHER THAN MAYBE EXPLAINING EVERYTHING
19 HE PUSHED OVER HAD TO BE PUT IN ONE FOOT LIFTS AND COMPACTED
20 TO THE SPECIFICATIONS.

21 Q NOW, IF HE'D PUSHED IT INTO THE WASTE AREA THAT'S
22 DESIGNATED ON THE PLANS, WHICH IS SOUTH OF DAYLIGHT OF CUT
23 SECTION, WOULD HE STILL HAVE THE SAME CONDITION TO CONTEND
24 WITH?

25 A YES. AND THE MATERIAL HAD TO HAVE BEEN PUT IN

1 ONE FOOT LIFTS.

2 Q I HAND YOU, MR. JOHNSON, WHAT'S MARKED AS EXHIBIT
3 68-D. I'LL REPRESENT IT'S A PHOTOGRAPH TAKEN BY ALBERT
4 SPENSKO ON THE 26TH OF MARCH, '86. DO YOU RECOGNIZE THAT
5 AS BEING OF THE PROJECT AREA?

6 A YES, JUST RIGHT AFTER THEY STARTED WORKING.

7 Q AND ARE THEY PUSHING MATERIAL INTO THE SLOPE,
8 THE LOOSE MATERIAL THAT WE'VE BEEN TALKING ABOUT? REFERRING
9 HERE?

10 A YES, SIR, PUSHING IT ON THE TOP OF THE HOLE,
11 TOP OF THE HOLE THAT THEY NEED.

12 Q IN THAT PHOTOGRAPH CAN YOU SEE ANY GEOGRAPHICAL
13 OR PHYSICAL FEATURES WHICH ARE VISIBLE IN THE FRONT WHERE
14 THEY'RE PUSHING MATERIAL IN WHICH ARE ALSO VISIBLE AROUND
15 IN THE WASTE AREA?

16 A YES, IT WAS THE SAME LEDGE, SAME HILLS, YES.

17 Q OKAY. IS THE TERRAIN ANY DIFFERENT BACK IN THE
18 DESIGNATED STATIONINGS FOR THE WASTE AREA, IF THEY WERE
19 TO PUSH MATERIAL THERE, THAN IT WOULD BE TO PUSH IT OFF
20 THE EAST FACE?

21 A NO. IT WAS PROBABLY A LITTLE STEEPER ON THAT
22 SOUTH.

23 Q OKAY.

24 JUDGE YOUNG: WHILE HE'S REVIEWING THAT, DO YOU
25 OFFER THE OTHER EXHIBITS YOU'VE HAD MARKED?

1 MR. FORD: I DO, YOUR HONOR.
2 JUDGE YOUNG: LET'S GO THROUGH THEM NUMERICALLY.
3 MR. FORD: THERE WERE SOME YESTERDAY TOO.
4 JUDGE YOUNG: WHY DON'T WE--LET'S IDENTIFY
5 EXHIBITS AND OFFER THEM AT THE TIME THEY'RE IDENTIFIED AND
6 THAT WAY WE WOULDN'T HAVE TO GO BACK THROUGH THEM.
7 63-D IS THE CONTRACTOR'S REQUEST FOR AN EQUITABLE
8 CONTACT ADJUSTMENT. THAT'S WHAT IT'S TITLED.
9 MR. BABCOCK: NO OBJECTION TO THAT.
10 JUDGE YOUNG: THAT'S RECEIVED.
11 (WHEREUPON, DEFENDANT'S EXHIBIT
12 NO. 63 WAS OFFERED AND RECEIVED
13 INTO EVIDENCE).
14 JUDGE YOUNG: THEN 64 IS AN ENLARGED PHOTOGRAPH.
15 MR. BABCOCK: NO OBJECTION.
16 JUDGE YOUNG: RECEIVED.
17 (WHEREUPON, DEFENDANT'S EXHIBIT
18 NO. 64 WAS OFFERED AND RECEIVED
19 INTO EVIDENCE).
20 JUDGE YOUNG: THE PROJECT DIARIES ARE 65 AND 66.
21 MR. BABCOCK: WE HAVE NO OBJECTION TO THOSE.
22 JUDGE YOUNG: THEY ARE RECEIVED.
23 (WHEREUPON, DEFENDANT'S EXHIBITS
24 65 AND 66 WERE OFFERED AND
25 RECEIVED INTO EVIDENCE).

1 JUDGE YOUNG: THE DIAGRAM CHART IS 67.

2 MR. BABCOCK: WE HAVEN'T SEEN THAT BEFORE TODAY.

3 IF WE COULD RESERVE THAT TILL WE COULD DO SOME COMPARISONS

4 WITH THE DIARIES DURING MAYBE THE NOON RECESS WE CAN RESPOND

5 AT THAT POINT. I PRESUME IT'S ACCURATE. I DON'T HAVE ANY

6 REASON TO DOUBT IT, BUT I WOULD LIKE TO--

7 JUDGE YOUNG: THE PHOTOGRAPH THAT YOU'RE JUST

8 REVIEWING?

9 MR. BABCOCK: NO OBJECTION TO THAT.

10 JUDGE YOUNG: THAT'S RECEIVED.

11 (WHEREUPON, DEFENDANT'S EXHIBIT
12 NO. 68 WAS OFFERED AND RECEIVED
13 INTO EVIDENCE).

14 JUDGE YOUNG: 67-D HAS NOT BEEN RULED ON AT THIS
15 TIME.

16 Q (BY MR. FORD) ON PAGE 48 WOULD YOU TELL US WHAT
17 SIGNIFICANT ITEMS YOU RECORDED THERE? MAY THE--

18 A MAY THE 23RD, 1986?

19 Q YES.

20 A JIM DIDERICKSEN WAS A VISITOR ON THE PROJECT.

21 HE DECIDED PROCON MADE THE DECISION TO DRILL AND BLAST THE
22 ROCK AT STATION 856-860.

23 Q MR. JOHNSON, DID YOU OBSERVE PROCON'S EFFORT
24 TO RIP THE MATERIAL IN THE CUT SECTIONS?

25 A YES.

1 Q WERE THEY ABLE TO RIP THAT MATERIAL?

2 A NOT ALL OF IT, NO.

3 Q WHERE DID THEY HAVE--DID THEY ENCOUNTER PROBLEMS
4 IN THEIR RIPPING?

5 A I DON'T KNOW HOW FAR DOWN IN THE CUT THEY GOT
6 BUT STATION 856-860 THERE WAS A LAYER OF HARD MATERIAL.

7 Q IS THAT IN THE SLIVER CUT SECTION?

8 A YES.

9 Q NOW, THEY WERE USING A KOMATSU; IS THAT CORRECT?

10 A YES.

11 Q WITH A SINGLE SHANK RIPPER.

12 A YES.

13 Q AND HAD YOU HAD EXPERIENCE IN PREVIOUS JOBS
14 WORKING IN FORMATIONS SIMILAR TO THIS?

15 A YES.

16 Q HAD CONTRACTORS USED RIPPERS ON THOSE PROJECTS?

17 A YES.

18 Q WHAT SIZE TRACTORS DID THEY USE?

19 A THE D8'S AND THE D9 CATERPILLAR.

20 Q IN YOUR EXPERIENCE AS AN INSPECTOR, AND OBSERVING
21 EQUIPMENT WORKING ON A DAILY BASIS, HAVE YOU HAD OCCASION
22 TO FORM AN OPINION AS TO THE RELATIVE RIPPING CAPABILITY
23 OF A D8 AND A D9?

24 A YES. THE D9 WAS A LITTLE BETTER THAN THE D8.
25 PROBABLY A LITTLE HEAVIER EQUIPMENT.

1 Q AND IS WEIGHT A CONTRIBUTING FACTOR IN THAT
2 ABILITY?

3 A I THINK SO, YES.

4 Q COULD YOU EXPLAIN TO THE JUDGE WHY YOU BELIEVE
5 THAT?

6 A THE HEAVIER WEIGHT, AND WITH THE, OF COURSE,
7 THE HORSEPOWER OF THE ENGINE, IT SEEMED TO RIP ON THE
8 MATERIAL EASIER THAN THE D8'S OR THE D7'S, AND THE KOMATSU
9 DIDN'T RIP AS GOOD AS THE D8, I DIDN'T THINK, OR WOULD,
10 ANYWAY.

11 Q IF I TOLD YOU THAT PREVIOUS TESTIMONY HAS ESTAB-
12 LISHED THAT THE KOMATSU HAS SLIGHTLY MORE HORSEPOWER THAN
13 A D8 DOES THAT CONTRIBUTE TO THE RIPPING CAPABILITY OF A
14 KOMATSU?

15 A PROBABLY NOT. I DON'T THINK SO. THE THING--
16 THE WEIGHT IS THE FACTOR.

17 Q THIS IS AGAIN, JUST BASED ON YOUR OBSERVATIONS?

18 A YES.

19 Q YOU DON'T HAVE ANY EXPERIENCE AS TO WHETHER THEY
20 USE CATERPILLAR OR FOREIGN EQUIPMENT, DO YOU?

21 A NO, I HAVE NO PREFERENCE. THAT'S THE FIRST TIME
22 I SEEN, I WORKED AROUND A KOMATSU DOZER, THOUGH. FIRST
23 TIME I'D SEEN ONE.

24 Q HAVE YOU HAD OCCASION TO WORK ON PROJECTS WITH
25 STEEP GRADES SIMILAR TO THE GRADES THAT WERE ENCOUNTERED

1 OR THAT WERE BEING WORKED ON IN THE CLAY HILLS PASS PROJECT?

2 A YES.

3 Q HAVE YOU OBSERVED CONTRACTORS USE SCRAPERS IN

4 THOSE TYPES OF, THAT TYPE OF TERRAIN BEFORE?

5 A YES, THE SCRAPERS, OR THE CAT PULLING THE SCRAPER,

6 PULLING THE SCRAPER BEHIND THE CAT.

7 Q THAT'S COMMONLY REFERRED TO AS THE OLD CAT AND

8 CAN?

9 A CAT AND CAN, YES.

10 Q THAT'S THE WAY A LOT OF DIRT WAS MOVED BEFORE

11 THEY GOT BIGGER SCRAPERS; IS THAT RIGHT?

12 A YES.

13 Q IN YOUR OPINION WOULD THAT HAVE BEEN A METHOD

14 THAT A CONTRACTOR COULD HAVE USED TO MOVE THE MATERIAL IN

15 THIS PROJECT?

16 A YES.

17 Q THOSE ARE VERY STEEP GRADES COMING OFF OF THERE.

18 IS THERE ANY QUESTION BUT WHAT A SCRAPER COULD NEGOTIATE--

19 A YES, THEY COULD NEGOTIATE 'EM WITH PROBABLY--

20 AND HAVE TO BE PUSHED BACK UP THE HILL, THOUGH.

21 Q OKAY.

22 A EMPTY.

23 Q WOULD YOU REFER TO PAGE 54 OF YOUR DIARY? NOW,

24 THAT DATE IS JUNE 2ND, I BELIEVE.

25 A YES, JUNE 2ND, 1986.

1 Q NOW, DID YOU MEASURE THE DEPTHS THAT WERE
2 REMAINING IN THE DAYLIGHT CUT SECTION ON THAT DATE?

3 A YES, AT CUTS REMAINING AT CENTERLINE AT THE
4 STATION 866. DO YOU WANT ME TO GIVE YOU THEM FIGURES?

5 Q NO, I DON'T THINK I'M CONCERNED ABOUT THE FIGURES
6 AS MUCH AS DID YOU PERFORM THESE MEASUREMENTS YOURSELF OR
7 DID YOU--WHAT WAS THE PURPOSE FOR MEASURING--

8 A TO SEE HOW MUCH DIRT WAS LEFT AT THE CENTERLINE
9 AREA ON THESE STATIONS.

10 Q NOW, AT THE TIME WERE THEY ENCOUNTERING DIFFICULTY
11 IN RIPPING OR REMOVING THAT MATERIAL?

12 A NOT THIS MATERIAL, NO.

13 Q ON PAGE 62 WOULD YOU TELL US WHAT DATE THAT IS?

14 A JUNE THE 12TH, 1986.

15 Q YOU RECORDED ON THAT DATE THAT THE LOADER STILL
16 HAS A FLAT TIRE. AND I THINK IF YOU WENT BACK A COUPLE
17 OF DAYS BEFORE WE COULD FIND WHERE THE LOADER WAS DOWN
18 BECAUSE OF A FLAT TIRE; IS THAT CORRECT?

19 A YES.

20 Q NOW, DID THAT HAMPER HIS OPERATION IN ANY WAY?

21 A VERY MUCH SO. THEY USED THE BACKHOE TO LOAD
22 THE TRUCKS, LOAD THE ONE TRUCK, ANYWAY, THAT DAY. SORRY.
23 THEY AT LEAST HAD ONE.

24 Q ON PAGE 65, I BELIEVE, YOU MADE A NOTATION ABOUT
25 RUNNING OUT OF DIRT. CAN YOU EXPLAIN ABOUT THAT? TELL

1 US WHAT DAY IT IS FIRST.

2 A JUNE THE 17TH, 1986. THE BACKHOE AND LOADER
3 LOADING TRUCKS HAULING TO FILL AREA, THEY KEEP RUNNING OUT
4 OF DIRT. THEY COULDN'T FILL FAST ENOUGH OR WERE WAITING
5 FOR A DRILL SO THEY COULD MAKE SOME DIRT, DRILL AND BLAST
6 IT.

7 Q SO THEY WERE RIPPING THE MATERIAL OUT, AND WERE
8 THEY LOADING IT DIRECTLY THERE OR WERE THEY STOCKPILING
9 IT, OR WHAT WERE THEY DOING?

10 A LOADING DIRECTLY THAT DAY.

11 Q ON THE NEXT DAY YOU RECORDED THE TRUCKS WERE
12 SHUT DOWN AT 3:00 O'CLOCK; IS THAT CORRECT?

13 A YES. TRUCK SHUT OFF AT 3:30 P.M. BECAUSE THERE
14 WAS NO MATERIAL FOR THEM TO HAUL AGAIN AT THAT TIME. LOOSE
15 MATERIAL. THERE'S A LOT OF MATERIAL THAT HADN'T BEEN DRILLED
16 OR RIPPED YET.

17 Q ON PAGE 75, WOULD YOU REFER TO THAT ONE?

18 A JULY THE 1ST, 1986.

19 Q YOU REPORTED SOMETHING ABOUT A NEW OPERATOR,
20 DIDN'T YOU? TELL US WHAT PROBLEMS YOU OBSERVED ON THAT
21 DAY, IF ANY.

22 A DOZER OPERATOR TO THE FILL AREA. I TOLD GILBERT
23 DIDN'T LOOK LIKE HE COULD PUSH THE ONE FOOT LIFTS AND CUT
24 LOOSE MATERIAL FROM THE COVES. MAYBE BETTER CHANGE OPERATOR.
25 HE WASN'T DOING IT, THE JOB, PUSHING THE LIFTS

1 OUT, AND THIS MATERIAL OUT OF THE COVE THAT THEY'D PUT THE
2 LOOSE MATERIAL IN. AND HE JUST WASN'T DOING A VERY GOOD
3 JOB. I COULDN'T TELL THE TRUCK DRIVERS OR OPERATORS WHAT
4 TO DO. AND SO I TOLD GILBERT.

5 Q AND HE WAS THE SUPERVISOR?

6 A HE WAS THE SUPERVISOR.

7 Q OKAY. ON THE 3RD OF JULY, WOULD YOU TELL US,
8 YOU REPORTED SOMETHING ABOUT A NEW PLAN OF OPERATION.

9 A JULY THE 3RD, 1986. JIM DIDERICKSEN AND VALERIE
10 WERE ON THE PROJECT. JIM DIDERICKSEN HAS A NEW PLAN TO
11 PUSH THE DIRT FROM STATION 860-864 TO THE LOADER. AND DOZER
12 PUSHES TO ANOTHER DOZER TO PUSH IT DOWN WHERE THE LOADER
13 CAN LOAD IT IN THE TRUCKS.

14 Q SO HOW MANY TIMES IS THE MATERIAL BEING HANDLED
15 IN THAT TYPE OF--

16 A THREE.

17 Q IN YOUR OPINION IS THAT AN EFFICIENT OPERATION?

18 A NO. THIS WAS THE EASY DIRT AT THIS PARTICULAR
19 AREA. IT DIDN'T HAVE TO BE RIPPED.

20 Q NOW, DO THE CONDITIONS GET ANY BETTER THAN THE
21 CONDITIONS THAT WE'VE DESCRIBED AND DO THEY SHOW UP ON THE
22 PRODUCTION FIGURES?

23 A NOT AT THIS TIME UNTIL THEY BROUGHT IN SOME
24 SCRAPERS.

25 Q WHEN DID THEY BRING IN THE SCRAPERS? IT WAS

1 LATER IN THE YEAR, WASN'T IT?

2 A YES.

3 Q IF WE LOOK OVER HERE ON EXHIBIT 67-D, HERE IS
4 THE FIRST OF OCTOBER RIGHT HERE WHERE I'M POINTING.

5 A OKAY.

6 Q AND WE SEE SOME HIGH PRODUCTION FIGURES IN THIS
7 DIAGRAM. IS THAT WHEN THE SCRAPERS WERE ON THE PROJECT?

8 A I HAVE GOT TO CHECK MY DIARY.

9 Q IT PROBABLY WON'T BE IN THAT ONE.

10 A ON THE FIRST OF--

11 Q OCTOBER. OR AROUND THAT TIME.

12 A ON THE 2ND OF OCTOBER THERE WAS TWO SCRAPERS
13 AND TWO DOZERS ON THE PROJECT, YES.

14 Q NOW, IT'S A FACT, ISN'T IT, THAT BY THIS TIME
15 THE GRADE AND THE WASTE FILL AREA HAD BEEN BROUGHT UP CONSI-
16 DERABLY IN ELEVATION.

17 A YES.

18 Q AND THE CUTS ARE ALSO DOWN CONSIDERABLY IN ELE-
19 VATION. SO IT'S REALLY NOT FAIR TO SAY THAT ALL THIS
20 INCREASED PRODUCTION WAS SCRAPED, IS IT?

21 A YES.

22 Q IS IT YOUR OPINION THAT BY UTILIZING SCRAPERS
23 THAT THEY COULD HAVE INCREASED THESE PRODUCTION FIGURES?

24 A YES. THAT WAS THE DAY THEY STOPPED USING THE
25 ROCK TRUCK, ACCORDING TO THE DIARY, TOO.

1 Q NOW, THE WASTE AREA, THAT WAS--WHERE THE WASTE
2 MATERIAL WAS PLACED WAS ACTUALLY OUTSIDE OF THE DESIGNATED
3 STATION. YOU UNDERSTAND THAT, DON'T YOU?

4 A NO.

5 Q WERE YOU AWARE THAT PLANS DESIGNATED A STATIONING
6 WHERE THE WASTE AREA WAS TO BE PLACED?

7 A OH, YES.

8 Q AND WERE YOU AWARE THERE WAS A SLOPE THAT WAS
9 STAKED AND WASTE MATERIAL WAS PLACED WITHIN THAT SLOPE AREA
10 AND THAT THE SLOPED AREA IS OUTSIDE OF THE ACTUAL DESIGNATED
11 STATION?

12 A YES, I AM.

13 Q YOU ARE AWARE OF THAT?

14 A I AM.

15 Q WAS ANYTHING EVER SAID ABOUT THAT BEING A PROBLEM
16 TO YOU, BY ANYONE ASSOCIATED WITH PROCON?

17 A YES, BILL THOMAS MENTIONED WE'D CHANGED THE PLANS,
18 CHANGED THE CENTERLINE. I TOLD HIM, NO, WE DIDN'T CHANGE
19 THE CENTERLINE, IT WAS THE SAME PLACE.

20 Q AND WAS ANYTHING OTHER THAN THAT EVER SAID TO
21 YOU?

22 A NOT TO ME, NO. HE MIGHT HAVE SAID IT A COUPLE
23 OF TIMES BUT NOTHING.

24 MR. FORD: ONE MOMENT PLEASE, YOUR HONOR. THAT'S
25 ALL THE QUESTIONS I HAVE.

1 JUDGE YOUNG: CROSS-EXAMINATION?

2

3 CROSS-EXAMINATION

4 BY MR. BABCOCK:

5 Q YOU'VE INDICATED THAT YOU RECALL THE PUSHING
6 MATERIAL OFF TO CREATE THE ACCESS ROAD.

7 A YES, THEY MADE AN ACCESS ROAD THROUGH THE MATERIAL
8 THEY PUSHED OFF, YES.

9 Q WELL, THE PURPOSE OF PUSHING OFF THE MATERIAL
10 WAS TO PUT SOME MATERIAL THERE IN WHICH TO CREATE THE ACCESS
11 ROAD, WOULDN'T IT HAVE BEEN? OR DO YOU KNOW?

12 A I DON'T KNOW.

13 Q HOW WOULD IT AFFECT THE PRODUCTION IF THEY CON-
14 TINUED TO DOZE OFF IN THE AREA WHERE THEY CREATED THE ACCESS
15 ROAD TO GET TO THE BOTTOM WHERE YOU FOLKS HAD STAKED THE
16 WASTE AREA AND FILL?

17 A IT'D CREATE MORE MATERIAL TO REMOVE AND PLACE
18 IN THE ONE FOOT LIFTS.

19 Q YOU TALKED ABOUT, IF I REMEMBER RIGHT, YOU SAID
20 THAT THEY HAD DOZED--THIS IS MATERIAL THEY DOZED AND CREATED
21 THE ACCESS ROAD.

22 A YES.

23 JUDGE YOUNG: REFER TO THE EXHIBIT NUMBER, PLEASE.

24 MR. BABCOCK: IT'S 30-D.

25 Q (BY MR. BABCOCK) THAT WAS MATERIAL PUSHED DOWN

1 AND THEY CREATED THE ACCESS ROAD THROUGH THAT MATERIAL TO
2 GET TO THE BOTTOM.

3 A YES.

4 Q BUT TO GET TO THE BOTTOM IN THIS FASHION, TO
5 GET DOWN HERE TO THE AREA WHERE THE WASTE AREA WAS TO BE
6 PLACED--WASTE MATERIAL WAS TO BE PLACED--WOULD IT BE A
7 FEASIBLE OPERATION TO CONTINUE DOZING OFF THE FACE IF YOU'RE
8 TRYING TO HAUL DOWN THE HAUL ROAD TO GET MATERIAL TO THE
9 BOTTOM? CAN YOU DO BOTH SIMULTANEOUSLY?

10 A NO.

11 Q YOU HAVE GOT TO GO WITH ONE METHOD OR THE OTHER.

12 A YES.

13 Q NOW, IF YOU WERE ABLE TO DOZE OFF TO THE SOUTH
14 YOU COULD DO THOSE OPERATIONS SIMULTANEOUSLY, COULDN'T YOU?
15 YOU COULD DOZE OFF MATERIAL OFF TO THE SOUTH.

16 A YES.

17 Q AND MAINTAIN AN ACCESS ROAD TO GET TO THE BOTTOM
18 SO YOU COULD HAVE BOTH GOING ON.

19 A MM-HMM, YES.

20 Q THIS IS THE FIRST PROJECT WHERE YOU'VE SEEN THESE
21 ARTICULATED TRUCKS USED, APPARENTLY.

22 A YES, SIR.

23 Q YOU HAVEN'T SEEN 'EM SINCE?

24 A NO.

25 Q AND AS MR. FORD INDICATED, WHEN THE PRODUCTION

1 RATES WENT UP AT THE END WHEN SCRAPERS WERE BROUGHT IN THE
2 GRADE HAD ACTUALLY COME UP SIGNIFICANTLY SO YOU'RE NO LONGER
3 FIGHTING A STEEP GRADE EITHER IN THE CUT OR THE FILL.

4 A NOT GOING ON CENTERLINE BUT TO THE SOUTH IN THE
5 WASTE AREA, YES, IT WAS STEEP.

6 Q BUT THEY WEREN'T WORKING OFF TO THE SOUTH--

7 A THE SCRAPERS WERE.

8 Q --TO THE SOUTH OR TO THE EAST.

9 A BOTH. THEY WERE GOING DOWN THE SOUTH AND BACK
10 UP THE EAST.

11 Q LOOKING BACK AT EXHIBIT 30-D, SCRAPERS WERE COMING
12 OFF THIS DIRECTION.

13 A NO, THEY WERE GOING TO THE SOUTH.

14 Q THIS DIRECTION?

15 A YES. AND CIRCLING BACK UP TO THE EAST AND GOING
16 BACK UP THE GRADE. THEY COME DOWN THIS WAY AND THEN BACK
17 UP THIS WAY.

18 Q SO THE ACCESS ROAD WAS MODIFIED SOME AS THIS
19 CAME UP.

20 A THERE WASN'T AN ACCESS ROAD AT THAT TIME. IT
21 WAS SO HIGH THERE WAS NO ROAD ANY MORE, WE'RE JUST IN A
22 LEVEL AREA.

23 Q OKAY. SO IN THE LEVEL AREA THEY'RE BASICALLY
24 CIRCLING THIS WAY.

25 A YES. INTO THE WASTE AREAS ONLY. THE ROAD HAD

1 BEEN, ROADWAY HAD BEEN FINISHED.

2 Q AND THEN AT THAT POINT THAT'S IN STATIONS EAST
3 OF 867.

4 A 864--OH YEAH, YES. 867, YES.

5 Q THEY HAD NOT PLACED WASTE BACK IN 864, 865 AREA.

6 A THEY WERE DOING IT, MM-HMM.

7 Q MATERIAL WASTE WAS BEING PLACED IN 864 AND 865?

8 A MM-HMM. (YES).

9 Q YOU SURE OF THAT?

10 A YES.

11 Q DO YOU KNOW WHY THEY BROUGHT SCRAPERS IN?

12 A TO INCREASE THEIR PRODUCTION AND GET THAT MATERIAL
13 FINISHED, YES. I THINK THAT'S WHY.

14 Q INCREASE THEIR PRODUCTION AND GET IT DONE. DID
15 BOTH D.J.B. TRUCKS CONTINUE TO OPERATE IN CONJUNCTION WITH
16 THE SCRAPERS?

17 A NO. I'LL HAVE TO REFER TO MY DIARY.

18 Q YOU DON'T RECALL EXACTLY WHAT HAPPENED AT THAT
19 POINT IN TIME?

20 A NO. I'D HAVE TO LOOK AT MY DIARY.

21 MR. BABCOCK: CAN I HAVE A MINUTE?

22 JUDGE YOUNG: YOU MAY.

23 MR. BABCOCK: NO FURTHER QUESTIONS.

24 JUDGE YOUNG: THANK YOU. ANYTHING FURTHER OF
25 THIS WITNESS?

1 MR. FORD: YES, YOUR HONOR.

2

3

REDIRECT EXAMINATION

4 BY MR. FORD:

5 Q I HAND YOU WHAT'S BEEN MARKED AS EXHIBIT 69-D
6 WHICH IS A SMALL PHOTOGRAPH TAKEN FROM AN AERIAL PERSPECTIVE.
7 AND IT WOULD HAVE BEEN TAKEN, I THINK, SOME TIME IN THE
8 SEPTEMBER TIMEFRAME, OCTOBER TIMEFRAME. DOES THAT--FROM
9 THAT PHOTOGRAPH ARE YOU ABLE TO TELL IN THE AREA WHERE THE
10 SCRAPERS HAD BEEN WORKING?

11 A YES, YOU CAN SEE ON THE SOUTH YOU CAN SEE THE
12 ROAD THEY HAD TO COME DOWN WITH THEIR SCRAPERS DOWN THE
13 SLOPE ON THE SOUTH.

14 Q WHEN YOU SAY "ON THE SOUTH" YOU'RE TALKING ON
15 THE SOUTH OF THE FILL WHICH BEGINS ON THE LEFT SIDE OF THE
16 PICTURE; IS THAT CORRECT?

17 A YES, THAT 864 AREA.

18 Q CAN YOU ALSO SEE THE ROADWAY FILL HAVING BEEN
19 BROUGHT UP TO GRADE IN THAT PICTURE? OVER NEAR THE EXISTING
20 HIGHWAY?

21 A YES.

22 JUDGE YOUNG: WHEN YOU'RE FINISHED SHOWING THAT
23 TO COUNSEL COULD I SEE THE LAST TWO EXHIBITS, PLEASE? DO
24 YOU HAVE THE ONE BEFORE, MR. FORD, THE OTHER SMALL ONE?

25 MR. BABCOCK: WE DON'T HAVE ANY OBJECTION.

1 JUDGE YOUNG: 68-D AND 69-D ARE EACH RECEIVED.
2 (WHEREUPON, DEFENDANT'S EXHIBIT
3 NO. 69 WAS OFFERED AND RECEIVED
4 INTO EVIDENCE).
5 Q (BY MR. FORD) NOW, MY UNDERSTANDING, MR. JOHNSON,
6 IS THAT LATE IN THE SUMMER THE CONTRACTOR DECIDED THAT SINCE
7 THE GRADE WASN'T--BY BUILDING THE WASTE FILL AND THE GRADE
8 SIMULTANEOUSLY THAT HE WAS GETTING BEHIND AND WAS CONCERNED
9 ABOUT GETTING THE PAVING OR THE GRAVELING OF THE NEW ROADWAY
10 SO HE ELECTED TO STEP IN AND BUILD UP THE ROADWAY FILL
11 LEAVING THE WASTE FILL FOR LATER; IS THAT CORRECT?
12 A YES.
13 Q DID YOU HELP IDENTIFY THE AREA THAT HE WOULD
14 NEED TO SLOPE AS FAR AS THE EMBANKMENT FILL FOR HIM? DID
15 YOU HELP HIM STAKE THAT AND SO FORTH?
16 A YES.
17 Q SHOW YOU WHAT'S BEEN MARKED AS EXHIBIT 33-D AND
18 I'LL ASK IF THAT, THE DARKER MATERIAL THAT SHOWS UP IN THE
19 PROXIMATE CENTER OF THE PICTURE, STRAIGHT DOWN FROM WHERE
20 THE EQUIPMENT IS PARKED, IF THAT IS THE ROADWAY FILL? AND
21 THERE'S--YOU CAN SEE THE ROCKS ON THE EDGE OF THAT FILL
22 AND THEN THERE'S A FLAT AREA AND THEN THERE'S AGAIN A FILL.
23 IS THE LOWER FILL THE WASTE FILL AND IS THE UPPER FILL THE
24 ROADWAY FILL?
25 A YES.

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MR. FORD: I BELIEVE THAT'S ALL I HAVE.

JUDGE YOUNG: THANK YOU, MR. JOHNSON. YOU MAY
STEP DOWN.

YOUR NEXT WITNESS?

MR. FORD: I'LL CALL BRAD PRICE.

Tab 17

1 ARE CIRCUMSTANCES IN WHICH YOU'LL PUSH FURTHER THAN THAT,
2 BUT YOU MADE THE CONDITION OF ECONOMIC LIMITS. AND THAT'S
3 WHERE I WOULD SAY WHEN YOU EXCEED 200 FEET YOU'RE BEGINNING
4 TO EXCEED THE POSSIBILITY OF ECONOMIC ADVANTAGE OF PUSHING
5 WITH A DOZER.

6 Q NOW, IF THE CONTRACTOR HAD ANTICIPATED PUSHING
7 THE MATERIAL WITH A DOZER, AND BASED ON THE PLANS THAT WE'LL
8 ASSUME THAT WAS A REASONABLE, NOT NECESSARILY A CORRECT
9 INTERPRETATION, OR NOT NECESSARILY THE PREFERRED, BUT A
10 REASONABLE CONCLUSION--

11 A IT WOULD BE A POSSIBLE WAY OF DOING IT.

12 Q A POSSIBLE WAY OF DOING IT.

13 A YES, CERTAINLY.

14 Q AND FOR SOME REASON IF HE WERE PREVENTED FROM
15 DOING THAT AND HAD TO HAUL IT, DO YOU HAVE A JUDGMENT AS
16 TO HOW MUCH, AND GIVEN CONDITIONS THAT EXISTED AT CLAY HILLS,
17 FOR INSTANCE, HOW MUCH ADDITIONAL THAT SHOULD COST A
18 CONTRACTOR?

19 A WELL, I THINK THAT THE DISTANCE OF THE CENTROID
20 OF THE MASS OF THE EXISTING EMBANKMENT VERSUS THE DISTANCES
21 TO THE CENTROID OF THE PLANNED EMBANKMENT COULD VERY WELL
22 BE DEFINED. AND THAT WOULD GIVE YOU A DISTANCE IN FEET,
23 REDUCABLE TO MILES, OR A FRACTION THEREOF, AND IT WOULD
24 BE POSSIBLE TO ARRIVE AT A REASONABLE COST, ADDITIONAL COST
25 OF HAULING MATERIAL ON A YARD/MILE BASIS, YES.

1 Q SUPPOSE WE WERE TO APPLY THE MOST EXPENSIVE HAUL-
2 AGE FACTOR, DO YOU HAVE A JUDGMENT AS TO HOW MUCH ADDITIONAL
3 IT MIGHT COST?

4 A WELL, IN MY INFORMATION I SUGGESTED A VERY GENER-
5 OUS YARD/MILE HAUL OF .50 CENTS A YARD MILE.

6 JUDGE YOUNG: BEFORE YOU LEAVE THAT I WOULD BE
7 CURIOUS TO KNOW IF YOU APPLIED THAT THEN TO THE DIFFERENCE--
8 IF YOU WERE TO APPLY THAT FROM A CENTROID OF WHAT WOULD
9 BE OUR NUMBERS? IF WE WERE TO TAKE MR. BABCOCK'S CENTROID
10 AT 867+50, WAS IT?

11 MR. FORD: I THINK IT WAS AT 869.

12 MR. BABCOCK: CALCULATED OUT AT 869 YOU WOULD
13 ASSUME, PROBABLY, THAT IT WOULD HAVE BEEN MID-POINT IN THE
14 DESIGNATED WHICH WOULD BE ABOUT 867+75.

15 MR. FORD: SO WE'RE TALKING ABOUT MAYBE 300,
16 325 FEET.

17 THE WITNESS: REDUCE THAT TO A FRACTION OF A
18 MILE TIMES THE NUMBER OF YARDS.

19 JUDGE YOUNG: HAVE YOU DONE THAT?

20 THE WITNESS: THE YARDAGE WE'RE TALKING ABOUT
21 HERE, I THINK, IS THE WASTE MATERIAL, THE WASTE EMBANKMENT,
22 AND I THINK THAT'S IN THE ORDER OF 94,000 YARDS.

23 MR. FORD: THERE WAS SOME ADDITIONAL YARDAGE
24 THAT WAS MOVED INTO THAT SO IT'S PROBABLY CLOSE TO 100--
25 BASED ON THE PAY QUANTITY, SOMEWHERE AROUND 125,000.

1 THE WITNESS: OKAY. 125,000 YARDS TIMES THE
2 FRACTION, SAY, 300 FEET AS OPPOSED TO 5,280 OF A MILE, TIMES
3 .50 CENTS WOULD GIVE YOU THE NUMBER. SO WE GOT A CALCULATOR
4 OR A PIECE OF PAPER AND WE'LL WORK IT OUT?

5 MR. BABCOCK: IT'S ABOUT \$4,000.00.

6 THE WITNESS: HOW MUCH?

7 JUDGE YOUNG: IT WORKS OUT TO PLUS OR MINUS
8 \$4,000.00. THAT SEEMS RATHER LOW TO ME. DOES IT TO YOU
9 AS WELL?

10 THE WITNESS: I'D HAVE TO RUN THE NUMBERS.

11 JUDGE YOUNG: IS IT CONSISTENT THAT MY NOTES
12 SHOW THAT THE CLAIM OF THE PLAINTIFF IS THAT THE STATE
13 CHANGED THE WASTE AREA FROM THE CENTROID OF THE WASTE AREA
14 BEING APPROXIMATELY 867 TO THE CENTROID BEING 871? IS THAT
15 IN ERROR?

16 MR. BABCOCK: YES.

17 JUDGE YOUNG: WHAT IS THE--

18 MR. BABCOCK: IT WOULD HAVE BEEN FROM APPROXI-
19 MATELY 865+75, WHICH IS IN THE MIDDLE OF THE DESIGNATED--

20 JUDGE YOUNG: BECAUSE THE DESIGNATED AREA WAS
21 864-867.

22 MR. BABCOCK: YEAH, EACH WITH +25. SO IT WOULD
23 BE 865+75.

24 JUDGE YOUNG: WOULD HAVE BEEN THE CENTROID OF
25 THE ORIGINAL WASTE AREA. AND WHAT WAS THE TESTIMONY THEN

1 THAT THE CENTROID OF THE--
2 MR. BABCOCK: 869+00, APPROXIMATELY. IT'S ABOUT
3 325 FEET.
4 JUDGE YOUNG: ALL RIGHT.
5 THE WITNESS: IF I HAVEN'T MADE ANY WRONG MATH
6 ERRORS IT'S ABOUT \$3,550.00 APPROXIMATELY.
7 JUDGE YOUNG: OKAY. THANK YOU.
8 Q (BY MR. FORD) 3,550 OR 35,000?
9 A 3,500. IF I HAVEN'T MISSED A DECIMAL.
10 MR. BABCOCK: WE HAVE A 35--
11 THE WITNESS: AND I ROUNDED THAT TO 125,000 YARDS
12 AND USED 300 FEET.
13 JUDGE YOUNG: OKAY. SO YOUR BELIEF IS THAT THE
14 ECONOMIC IMPACT OF TRUCKING WOULD BE AN ADDITIONAL \$4,000.00?
15 THE WITNESS: HOWEVER, I WOULD MODIFY THAT.
16 I DID NOT SAY TRUCKING, I SAID CONVEYING. WHETHER IT'S
17 TRUCKED, WHETHER IT'S MOVED WITH SCRAPERS, WHETHER IT'S
18 PUSHED WITH DOZERS, YOU'RE TALKING ABOUT A MEANS OF
19 CONVEYING.
20 JUDGE YOUNG: EVEN A POTENTIAL CONVEYOR BELT
21 OPERATION IF THAT WERE FEASIBLE.
22 THE WITNESS: YES.
23 JUDGE YOUNG: ALL RIGHT.
24 THE WITNESS: ONCE YOU HAVE THE MEANS OF CONVEY-
25 ANCE IN PLACE.

1 Q (BY MR. FORD) NOW, IS YOUR JUDGMENT AFFECTED
2 BY THE FACT THAT REGARDLESS OF HOW THEY PLANNED TO HANDLE
3 THE WASTE MATERIAL THAT THEY HAD A REQUIREMENT TO GO DOWN
4 AND BEGIN THE EMBANKMENT FOR THE HIGHWAY AT A POINT WHICH
5 WAS DOWN IN THE BOTTOM OF THE SO-CALLED HOLE?

6 A THAT IS CORRECT.

7 Q SO THEY WOULD HAVE TO CUT AN ACCESS FOR THAT.

8 A WHETHER YOU WASTED SOME PLACE ELSE YOU STILL
9 HAD TO PLACE THE EMBANKMENT, YOU HAD TO DO ALL OF THE PREPAR-
10 ATORY WORK TO PUT THE MATERIAL IN THE EMBANKMENT FOR THE
11 ROADWAY SECTION.

12 Q NOW, IS IT TRUE THAT IT WAS THE JUDGMENT OF THE
13 REVIEW TEAM THAT THE CLAIM AS PRESENTED BY PROCON WAS NOT
14 JUSTIFIED?

15 A THAT IS CORRECT, WE DID NOT FEEL IT WAS JUSTIFIED.
16 MR. FORD: YOUR WITNESS.

17

18 CROSS-EXAMINATION

19 BY MR. BABCOCK:

20 Q NOW, YOU'VE TALKED ABOUT YOUR COMPANY. I GUESS
21 IT'S ONE OF THE--IS IT THE LARGEST ROAD BUILDING COMPANY
22 IN THE STATE?

23 A WELL, LET'S PUT IT, UTAH STATE DOMICILED.

24 Q WHAT KIND OF SCRAPER FLEET DO YOU HAVE?

25 A CURRENTLY WE HAVE 631'S, 651, 633'S.

Tab 18

1 IS PREPARED AT THE STATE LEVEL. THE DETERMINATION AS TO
2 ADDITIONAL TIME, BASED ON ADDED QUANTITIES, IS A FUNCTION
3 OF THE TOTAL QUANTITIES IN RELATION TO THE ORIGINAL ESTI-
4 MATED AMOUNT. THAT'S A SIMPLE MATHEMATICAL COMPUTATION
5 WHICH IS DONE BY THE ESTIMATE SUPERVISOR AT THE STATE LEVEL
6 THAT MAKES OUT THE CHECKS FOR THE FINAL PAYMENT. SO THAT'S
7 WHEN THAT OCCURRED. AND THAT WAS AFTER THE FINAL ESTIMATE
8 WAS SUBMITTED, WHICH WAS A YEAR AND A HALF AFTER PROCON
9 EXITED THE JOB.

10 MR. BABCOCK: AND I DON'T HAVE A DISPUTE WITH
11 THAT, BUT I DON'T THINK THAT'S PART OF THE ISSUE OF THE--
12 SOME INCREASED QUANTITIES WAS NEVER PART OF THE ISSUE OF
13 THE TRIAL. IT WAS IMPACTS DUE TO CHANGES AND WHAT THE TIME
14 IMPACTS WERE DUE TO THOSE CHANGES.

15 MR. FORD: I WOULD REMIND YOU THAT PART OF THE
16 IMPACT WAS THE CHANGE IN THE NATURE OF THE-SLOPE WHICH GEN-
17 ERATED ADDITIONAL QUANTITIES. SO IT WAS TALKED ABOUT IN
18 THE TRIAL.

19 MR. BABCOCK: I AGREE. IT'S JUST--I THINK WE'VE
20 COVERED THAT.

21 JUDGE YOUNG: THANK YOU. THE EXHIBITS THEN
22 ATTACHED TO YOUR MEMORANDUM, 1, 5, AND 6, ARE APPROVED FOR
23 SUPPLEMENTING THE RECORD AND 3 IS DENIED.

24 MR. FORD: YOUR HONOR, THIS MOTION IS BROUGHT
25 UNDER RULE 59. AND IN LOOKING AT THE RULE I THINK MR.

1 BABCOCK IS PROBABLY CORRECT IN THAT THERE ARE CERTAIN GROUNDS
2 IN THERE WHICH ARE SPECIFIED. AND HE POINTS OUT THAT I
3 MUST BE RELYING ON SUBPARAGRAPH (1) AND (5). I DON'T HAVE
4 ANY SERIOUS ARGUMENT WITH THAT. I WAS JUST TRYING TO BE
5 A LITTLE KIND AND NOT ACCUSE THE COURT OF ACTING WITH PASSION
6 OR PREJUDICE. I DIDN'T WANT TO COME RIGHT OUT AND SAY THAT.
7 I WANT TO BE A LITTLE MORE TACTFUL.

8 JUDGE YOUNG: YOU DON'T NEED TO BE TACTFUL FOR
9 ME, MR. FORD. WE'RE BOTH BIG BOYS.

10 MR. FORD: I AGREE.

11 JUDGE YOUNG: I'VE GOT BROAD SHOULDERS. PEOPLE
12 HAVE BEEN LESS TACTFUL THAN THAT.

13 MR. FORD: ALL RIGHT. YOUR HONOR, WHAT IT BOILS
14 DOWN TO IS THIS. DURING THE TRIAL THE COURT, IN CHAMBERS,
15 EXPRESSED CERTAIN FEELINGS OF SYMPATHY TOWARD DIDERICKSEN.
16 AND I CAN UNDERSTAND THAT. I DON'T EVEN LIKE DIDERICKSEN
17 AND I CAN STILL FEEL SORRY FOR WHAT HAPPENED TO HIM.

18 JUDGE YOUNG: SURE.

19 MR. FORD: HOWEVER, I THINK WITH THAT, COUPLED
20 WITH THE FACT THAT U.D.O.T.'S EXPERT WITNESSES IN THEIR
21 ANALYSIS OF THE CLAIM COMING UP WITH NO JUSTIFICATION FOR
22 ANY ADDITIONAL SUMS, IT SEEMS THAT THAT MAY HAVE CAUSED
23 THE COURT TO REACT. AND THE FACT THAT THE COURT PICKED
24 THE SUMS WHICH WERE MOST ADVANTAGEOUS TO PROCON MAKES IT
25 ALMOST LOOK LIKE IT'S A REACTION TO THE FACT THAT U.D.O.T.'S

1 SEEMING INSENSITIVITY IN NOT OFFERING ANYTHING--IN FACT,
2 GOING OUT AND SPENDING A LOT OF MONEY TO HAVE AN EXPERT
3 COME IN--

4 JUDGE YOUNG: LET ME JUST COMMENT ON THAT. I
5 DON'T HAVE--I HAVE, OBVIOUSLY, NO PRIOR KNOWLEDGE AT ALL
6 OF MR. DIDERICKSEN, NOR ANY BIAS PRO OR AGAINST HIM AS A
7 RESULT OF ANY KNOWLEDGE OF HIM. HE'S A STRANGER TO ME UNTIL
8 HE WALKED INTO THE COURTROOM, AS YOU'RE PROBABLY WELL AWARE.

9 MR. FORD: I UNDERSTAND.

10 JUDGE YOUNG: THE CONCERN I HAD ABOUT THIS WAS
11 IT WAS ALMOST AN ALL OR NOTHING POSITION THAT WAS TAKEN.
12 THE STATE HAD SPENT SOMETHING, IF I RECALL CORRECTLY, IN
13 THE RANGE OF \$60,000.00 OR SO TO HIRE THE EXPERTS TO DO
14 THE STUDY, TO SEE WHETHER THIS WAS REALLY NECESSARY. THE
15 THING THAT I CAN RECALL FROM ALL OF THE TESTIMONY IS THAT
16 KIRKHAM AND ALL OF YOUR OTHER PEOPLE--THERE WAS TESTIFIED
17 THAT THEY COULDN'T REALLY SEE THAT DIDERICKSEN WAS DOING
18 BAD WORK. EVERYBODY HAD THE IMPRESSION THAT HE WAS WORKING
19 HARD AND NOT BROKEN DOWN AND NOT HAVING UNUSUAL REPAIRS,
20 AND THE KOMATSU CAT WAS OF COMPARABLE DIMENSIONS TO THE
21 PRIOR D9 CATS. AND IT JUST SEEMED TO ME THAT THEY WERE
22 USED FOR RIPPING--AS YOU'LL RECALL, IT JUST SEEMED TO ME
23 THAT THIS JOB JUST SIMPLY GOT COMPLETELY OUT OF HAND BECAUSE
24 OF THE UNEXPECTED DENSITY OF THE STRATA THAT HE ENCOUNTERED
25 AND, IN ADDITION, BECAUSE OF THE FACT THAT THE SLOPE, THE

1 AND RE-ARGUE THE MERITS OF THE CASE AND THE QUALIFICATIONS,
2 ET CETERA.

3 JUDGE YOUNG: I AM CONCERNED ABOUT THAT, MR.
4 FORD, BUT I DID SPECIFICALLY FIND IN THAT REGARD, THAT THERE
5 WERE THREE SUBSTANTIAL CHANGES IN THE PLAN, SIGNIFICANT
6 DEFECTS AS I RECALL, AND THOSE I STATED IN MY MEMORANDUM
7 DECISION WERE, ONE, THE MOVING OF THE WASTE AREA, WHICH
8 I DON'T CONCUR AFTER HEARING THE TESTIMONY THAT MR. CLYDE'S
9 PERCEPTION OF THAT IS VERY ACCURATE. JUST THE GENERAL TOPO-
10 GRAPHY OF THAT CHANGE CREATED A DIFFERENCE IN THE ANGLE
11 OF THE SLOPE. THE NATURE OF THE CHANGE CREATED THE NEED
12 TO TRUCK AND DUMP EVERYTHING RATHER THAN PUSHING IT OFF
13 AS THEY HAD PREVIOUSLY PLANNED. SO, IN MY VIEW I VIEWED
14 THAT AS A SUBSTANTIAL MODIFICATION.

15 THE SECOND WAS THE ANGLE OF THE SLIVER CUT, WHICH
16 I VIEWED AS A SUBSTANTIAL MODIFICATION.

17 AND THE THIRD WAS THE MISTAKE IN THE ESTIMATION
18 OF THE AMOUNT OF THE SWELL THAT WOULD HAVE BEEN CREATED
19 BY THE MATERIAL. THE SWELL, AS I RECALL, WAS ESTIMATED
20 TO BE FIVE PERCENT AND TURNS OUT TO BE NEARLY 20 PERCENT.
21 AND THAT SEEMS TO ME TO BE QUITE A DRAMATIC DIFFERENCE AND,
22 IN FACT, I THINK THERE WAS TESTIMONY EVEN FROM YOUR WITNESSES
23 THAT THAT WOULD BE A SUBSTANTIAL CHANGE.

24 MR. FORD: WELL, BUT THERE WAS ALSO TESTIMONY
25 THAT DEPENDING ON HOW YOU REMOVED THE MATERIAL WILL AFFECT

1 THE SWELL. IF YOU BLAST THE MATERIAL YOU GET MORE SWELL
2 THAN IF YOU RIP IT OUT.

3 JUDGE YOUNG: SURE.

4 MR. FORD: SO BASED ON--I MEAN, I AGREE THAT'S
5 A STUPID THING TO PUT IN THE PLANS AND, IN FACT, IS THE
6 EXPERT'S COMMENT ON IT THAT THIS COULD MISLEAD A LAYMAN,
7 NO CONTRACTOR SHOULD HAVE RELIED ON IT ACCORDING TO THEM,
8 IT COULD MISLEAD SOMEONE. SO FOR THAT REASON IT SHOULDN'T
9 HAVE BEEN PUT IN, AND I AGREE WITH THAT. BUT WHAT THEY'RE
10 SAYING IS HEY, THIS CONTRACTOR DIDN'T RELY ON THAT ANYWAY.

11 JUDGE YOUNG: LET ME EXPRESS MY CONCERNS AS TO
12 WHERE I WOULD PREFER YOUR ARGUMENT TO FOCUS. I'M NOT GOING
13 TO CHANGE THE DECISION THAT I'VE MADE. I THINK I WOULD
14 BE FOOLISH TO DO THAT AT THIS POINT, PARTICULARLY SINCE WHEN
15 I WROTE THAT MEMORANDUM DECISION--

16 MR. FORD: LET ME FOCUS--

17 JUDGE YOUNG: LET ME JUST FINISH. WHEN I WROTE
18 THAT MEMORANDUM DECISION THE FACTS WERE MUCH CLEARER IN
19 MY MIND THAN THEY WOULD BE EVEN TODAY AFTER THIS SUBSTANTIAL
20 PERIOD INTERVENING. SO I'M NOT GOING TO CHANGE THAT.

21 THE FRUSTRATION I'VE HAD WITH THIS CASE IS REALLY
22 IN THE OVERALL TOTAL AMOUNT. AND I STILL DIDN'T SOLVE THE
23 PROBLEM BECAUSE, AS I RECALL, THE PLAINTIFF INCURRED LOSSES
24 OF ABOUT 1.6 MILLION AND HIS CLAIM WAS 2.2 MILLION INITIALLY
25 IN ADDITION TO THAT WHICH HE WAS PAID WHICH WAS APPROXIMATELY

1 SEVEN--WELL, HE WASN'T PAID PROBABLY 719,000, WAS HE? HE
2 WAS PAID SOMETHING LESS THAN THAT.

3 MR. FORD: NO, HE WAS PAID MORE THAN THAT.

4 JUDGE YOUNG: OKAY. WITH THE ADDITIONS.

5 MR. FORD: THERE WERE OVERAGES.

6 JUDGE YOUNG: YEAH.

7 MR. FORD: EXCEPT THE 15 PERCENT WAS DONE BY
8 STATE--IT WAS SOMEWHERE AROUND CLOSE TO 700,000.

9 JUDGE YOUNG: WELL, THAT WAS MY IMPRESSION 'CAUSE
10 HE ONLY FINISHED 85 PERCENT OF THE WORK.

11 MR. FORD: THAT IS RIGHT.

12 MR. BABCOCK: THERE WAS RETENTION TOO.

13 JUDGE YOUNG: AND THE RETENTION, YEAH. WELL
14 ANYWAY, BUT THAT'S MY FRUSTRATION IN LIVING WITH THIS CASE
15 IS THE AMOUNT AND MAGNITUDE OF ALL OF THAT.

16 MR. FORD: WELL, LET ME FOCUS ON WHAT I THINK,
17 WHERE I THINK THERE IS A SIGNIFICANT ERROR IN THE COURT'S
18 RULING. AND THAT'S IN THE ADMISSION OF EXHIBIT 18-P. NOW,
19 THEY SAY THAT IT COMES IN AS A BUSINESS RECORD, AND SOME
20 PLACE IN THEIR ARGUMENT THEY MAKE THE STATEMENT THAT THERE
21 WAS EVIDENCE OF IT HAVING BEEN MAILED. I DON'T RECALL ANY
22 TESTIMONY AS TO ANYONE CONNECTED WITH PROCON THAT SAYS I
23 TYPED THE LETTER, I PUT THE LETTER IN THE MAIL, AND I PUT
24 POSTAGE ON IT AND I DROPPED IT IN THE MAILBOX. THERE WAS
25 NO TESTIMONY OF THAT. ALL IT IS IS A LETTER THAT SHOWS

1 UP IN THEIR FILES AND THEY'RE SAYING, WELL, IT'S A BUSINESS
2 RECORD. WELL, IT IS THE MOST SIGNIFICANT LETTER, THE MOST
3 SIGNIFICANT PIECE OF EVIDENCE IN THIS ENTIRE TRIAL BECAUSE
4 I WOULD SUBMIT THAT THEIR ENTIRE CLAIM FOR MOVING THE WASTE
5 AREA RIDES OR FALLS ON THE ADMISSIBILITY OF THAT LETTER.

6 THE U.D.O.T. SPECIFICATIONS, COPIES OF WHICH
7 I'VE EXCERPTED UNDER EXHIBIT 2--LET ME READ YOU WHAT IT
8 SAYS. SECTION 10402. AND THIS GOVERNS--THIS HAPPENS EVERY
9 DAY ON THE PROJECT. IT SAYS, "THE ENGINEER RESERVES THE
10 RIGHT TO MAKE, AT ANY TIME DURING THE PROGRESS OF THE WORK,
11 SUCH INCREASES OR DECREASES IN QUANTITIES AND SUCH ALTER-
12 ATIONS IN THE DETAILS OF CONSTRUCTION, INCLUDING ALTERATIONS
13 IN THE GRADE OR ALIGNMENT OF THE ROAD OR STRUCTURE OF BOTH
14 ELIMINATION OF ONE OR MORE ITEMS AS MAY BE FOUND NECESSARY."
15 AND HE GOES ON, GIVES THE ENGINEER ALL THIS AUTHORITY AND
16 THEN IT GOES ON FURTHER TO PUT LIMITS ON THAT AUTHORITY.
17 "THE CONTRACTOR IS ENTITLED TO CLAIM SUPPLEMENTAL RELIEF
18 IF HE CAN ESTABLISH THERE IS AN OVERRUN OR UNDERRUN MORE
19 THAN 25 PERCENT EITHER IN THE TOTAL CONTRACT OR IN THE MAJOR
20 QUANTITY." WE DON'T HAVE THAT ISSUE, BUT DOWN IN NO. 4,
21 "A CHANGE IN THE NATURE OF THE DESIGN OR IN THE CHARACTER
22 OF CONSTRUCTION WHICH MEASURABLY INCREASES OR DECREASES
23 THE UNIT COST."

24 SO WHAT THIS IS SAYING IS IF THE ENGINEER GOES
25 OUT AND CHANGES THE WASTE AREA LOCATION THEN THE CONTRACTOR

1 HAS GOT TO SAY TO HIM, THAT'S A CHANGE IN THE PLANS AND
2 THAT'S GOING TO IMPACT ME AND HERE'S HOW IT'S GOING TO IMPACT
3 ME AND I WANT A SUPPLEMENTAL AGREEMENT BEFORE I AGREE TO
4 DO THE WORK. NOW, THAT ISN'T WHAT HAPPENED HERE.

5 NOW, IF THE LETTER HAD BEEN RECEIVED, THEN THE
6 STATE WOULD HAVE BEEN ON NOTICE, THEN THEY CAN DECIDE AT
7 THAT POINT WHAT THEY WANT TO DO AND THEY CAN ENTER INTO
8 NEGOTIATIONS AND GET AN AGREEMENT ON HOW MUCH IT'S GOING
9 TO COST AND THE CONTRACTOR CAN--BUT WITHOUT NOTICE, EITHER
10 WRITTEN OR VERBAL, THE ENGINEER HAS NO IDEA THAT THERE'S
11 GOING TO BE--HE HAS A RIGHT TO ASSUME AND, IN FACT, IT
12 PROVIDES THAT THE CONTRACTOR WAIVES HIS RIGHT TO CLAIM
13 COMPENSATION WITHOUT GIVING THAT NOTICE.

14 NOW, MR. KIRKHAM TESTIFIED THAT NOT ONLY DID HE
15 NOT RECEIVE THE LETTER BUT NO VERBAL COMMUNICATION WAS EVER
16 GIVEN TO HIM THAT THEY WERE UNHAPPY WITH THE MOVEMENT OF
17 THE WASTE AREA LOCATION UNTIL THE PLAINTIFF ARRIVED, AFTER
18 THE WORK WAS DONE. AND THERE WAS NO TESTIMONY THAT I RECALL
19 FROM ANY WITNESS CONNECTED WITH PROCON WHICH CAN ESTABLISH
20 THAT POINT. SO 18-P BECOMES VERY KEY.

21 THE FACT THAT WE WERE ABLE--WE REPRESENTED THAT
22 THE AUTHOR OF THE LETTER DID NOT RECALL THE LETTER, DIDN'T
23 RECALL ANY OF THE CIRCUMSTANCES AROUND IT. I FULLY EXPECTED,
24 IF YOU READ UNDER EXHIBIT 1, IF YOU READ WHAT HE SAYS THERE,
25 HE SAYS, WELL, I DON'T HAVE MY DIARY WITH ME AND I DON'T

Tab 19

Q 864+25 TO 867+25 IS WHAT THE PLANS SAY.

A OKAY.

Q I'LL REPRESENT TO YOU THAT THE AREA WHERE THE WASTE IS ACTUALLY PLACED IS BETWEEN 864+50 TO 870.

A UH-HUH.

Q SO IT WAS EXTENDED APPROXIMATELY 275 FEET?

A WHICH IS HORIZONTAL AND TWO HUNDRED-SOMETHING FEET VERTICAL.

Q OKAY. THE CENTROID OF MASS IS LOCATED AT 867 TO THE ENGINEERING FIRM?

A OKAY. THAT'S OVER THE EDGE OF THE VERTICAL DROP, RIGHT ON THE EDGE OF THE VERTICAL DROP, SO YOUR CENTER IS AT THE EDGE OF THE VERTICAL DROP AND THAT'S WHERE THE VERTICAL DROP STARTED. AND IT WAS A VERTICAL DROP ALMOST -- I'D SAY IT WAS HALF TO ONE SLOPE. WHICH IS A SUBSTANTIAL CHANGE.

Q AS FAR AS THE CUT THAT YOU WERE SUPPOSED TO REMOVE THE MATERIAL, WAS THAT DESIGNATED ON THE PLANS, THE SLOPE?

A SLOPE WAS DESIGNATED ON THE PLANS, CORRECT.

Q DO YOU REMEMBER WHAT THE PLANS DESIGNATE?

A HALF TO ONE.

Q OKAY. AND WHAT DID YOU ACTUALLY REMOVE IT ON?

A I BELIEVE IT WAS ONE-AND-A-HALF TO ONE OR ONE TO ONE.

Q ONE TO ONE?

A I CAN'T REMEMBER EXACTLY.

Q OKAY. I BELIEVE IT WAS ONE TO ONE. NOW, YOU WERE INFORMED THAT THE REMOVAL WOULD BE ON A ONE TO ONE AT THE TIME OF THE SITE VISIT, WEREN'T YOU?

A I THINK MR. KIRKHAM TOLD US THAT, AND THEN WE WENT BACK, I THINK WE WERE ON THE 29TH. AND MONDAY BEFORE THE BID OPENING WE THOUGHT HE WAS GOING TO ISSUE A WRITTEN ADDENDUM. AND I BELIEVE LARRY FILLMORE AND MYSELF CALLED TO SEE IF THERE WAS ANY CHANGES, IF THERE WAS ANY CHANGES IN THE JOB OR SHOULD WE BID IT AS DRAWN, AND MR. KIRKHAM SAID, "BID IT AS DRAWN." AND SO WE BID IT WITH A HALF TO ONE, IF I RECALL RIGHT. AND I'M NOT AWARE OF ANY ADDENDUMS THAT ISSUED A CHANGE.

Q THE EXISTING SLOPE WAS WHAT, DO YOU KNOW?

A I'M NOT SURE. I CAN'T RECALL WHAT THE EXISTING SLOPE WAS.

Q DIDN'T MR. KIRKHAM TELL YOU?

A WHAT THE EXISTING SLOPE WAS?

Q UH-HUH.

A I DON'T BELIEVE THAT HE TOLD US WHAT THE EXISTING SLOPE WAS. HE COULD HAVE, BUT I DON'T RECALL THAT.

Q IT WOULDN'T MAKE MUCH SENSE IF THE EXISTING SLOPE WAS ONE TO ONE, IT WOULDN'T MAKE MUCH SENSE TO CUT 20 FEET INTO THE HILL AND PUT IT ON A HALF TO ONE, WOULD IT?

A I DIDN'T DESIGN IT.

Q NO, BUT I'M ASKING YOU.

1 A I GUESS THIS IS WHERE I MAKE A STATEMENT, IS I
2 DON'T ANTICIPATE AND DON'T TRY TO OUT THINK THE ENGINEERS. I
3 THINK IF THERE IS A MISTAKE OR IF I DID THAT I WOULD GET IN
4 SERIOUS TROUBLE. AS I SAID, I'M RELYING ON THE WARRANTY OF
5 THE PLANS.

6 Q WELL, DID YOU ASK HIM WHEN YOU SPOKE TO HIM ON THIS
7 MONDAY THAT YOU SAID BEFORE THE BID OPENING, DID YOU TELL HIM
8 THAT YOU WANTED TO KNOW WHETHER THERE WAS A CHANGE
9 SPECIFICALLY AS TO THE SLOPE?

10 A WE ASKED HIM IF THERE WAS ANY CHANGES TO THE BID
11 PLANS OR SHOULD WE BID THEM AS THEY ARE DRAWN, AND HE SAID --
12 IF I RECALL, HE SAID, "THERE IS NO CHANGES, BID IT AS DRAWN."
13 AND THAT'S -- THAT WAS, AS I RECALL, WAS HIS WORDS TO US.

14 Q BUT HE'D ALREADY TOLD YOU ON A SITE VISIT THAT IT
15 WAS GOING TO BE REMOVED ON A ONE TO ONE. DID YOU POINT OUT
16 THERE WAS A CONFLICT IN THE PLANS?

17 A WELL, WHAT I REMEMBER, MR. FILLMORE TALKED TO HIM
18 ON THE PHONE. I WAS IN THE BID OFFICE WITH THEM AND I
19 REMEMBER MR. FILLMORE SAYING, INDICATED IT WAS ONE TO ONE. "
20 IS IT ONE TO ONE, OR SHOULD WE BID IT AS DRAWN ON THE PLANS?"
21 AND MR. KIRKHAM SAID BID IT -- "TO BE SAFE, TO BE SAFE BID IT
22 AS DRAWN OH THE PLANS."

23 Q NEVERTHELESS, YOU AGREE THAT YOUR BID NOTES SAY --

24 A HE DID SAY THAT ON THE JOB TOUR. I REMEMBER HIM
25 SAYING THAT ON THE JOB TOUR. WHEN WE ASKED HIM, HE SAID TO

BE SAFE BID IT AS DRAWN.

Q DID YOU MAKE ANY NOTATIONS IN YOUR BID WORK-UP, ESTIMATE, OR ANYTHING AS TO THAT TELEPHONE CONVERSATION?

A I DID SOMEWHERE, WROTE IT DOWN SOMEPLACE. I USUALLY DO.

Q HERE'S YOUR BID NOTES AND CALCULATIONS, HERE'S YOUR SITE INVESTIGATION REPORT. IF WE COULD HAVE THOSE MARKED AS GROUP EXHIBITS I'LL ASK YOU TO FIND THEM IN THERE FOR ME.

(WHEREUPON, DEFENDANT'S EXHIBIT 1, PARTS 1 AND 2, WERE MARKED FOR IDENTIFICATION.)

A THEY COULD HAVE BEEN WRITTEN ON A SET OF THE DRAWINGS OR A SET OF OTHER NOTATIONS FOR MY PURPOSES. OFFHAND CAN'T SEE WHERE IT IS ON THOSE. BUT I RECALL GETTING THAT INFORMATION. AS I SAID, THERE IS NO ADDENDUM WHICH INDICATED OTHERWISE THAT I RECALL RECEIVING. USUALLY THAT'S THE STANDARD PRACTICE AT LEAST FOR ME, IS CALLING THE ENGINEER TO SEE IF THERE HAS BEEN ANY CHANGES, OR IF THEY WERE GOING TO FOLLOW UP WITH ANY CHANGES AND ADDENDUMS I MAY HAVE MISSED.

Q (BY MR. FORD) WELL, I'M REFERRING HERE TO DEFENDANT'S EXHIBIT 1, PART 1, PAGE SEVEN THERE IS A LIST OF THE QUESTIONS. QUESTION 1 SAYS "PLANS AND PROFILES VERY UNCLEAR AND CONFUSING. CLARIFY AS TO CUT AND FILL, PLACEMENT AND LOCATION OF ITEMS." DOWN AT THE BOTTOM OF THE PAGE IT SAYS "RESPONSE. 1. MR. KIRKHAM, P.E., POINTED OUT CUT AREA

BY SHOWING CENTER LINE STAKES. CUT SLOPE ONE TO ONE TO TOP, APPROXIMATELY 200 FEET. FILL GORGE 200 FEET DEEP. PLANS DIFFICULT TO READ." NOW, IT CLEARLY INDICATED IN HERE THAT HE TOLD YOU NOT ONLY ONE TO ONE, BUT THAT IT'D BE APPROXIMATELY 200 FEET UP IN THE AIR.

A UH-HUH.

Q IF YOU CUT IT ON A HALF TO ONE YOU WOULDN'T BE NEARLY THAT HIGH, WOULD YOU?

A WELL, I DIDN'T MEASURE IT, YOU SEE. THAT WAS ON --I TOOK HIS WORD AT THAT TIME. AS I SAID, WE WENT BACK AND WAS WAITING FOR EITHER AN ADDENDUM OR NOTIFICATION ONCE LARRY POINTED OUT THE FACT THAT IT WAS HALF TO ONE. THAT'S MY RECOLLECTION. AND THE ENGINEER -- IT'S BEEN MY EXPERIENCE, LEE, THAT THE ENGINEERS TELL YOU ONE THING, AND IF THEY DON'T FOLLOW UP WITH AN ADDENDUM THAT YOU CAN'T USE -- YOU KNOW, SOME OF THE THINGS THEY TELL YOU HAS TO BE FOLLOWED UP WITH AN ADDENDUM. IF THERE'S A CHANGE IN THE PLANS -- MAYBE HE MISREAD THE PLANS. MAYBE HE WAS ANTICIPATING SOMETHING WITHOUT REVIEWING THE PLANS. THAT'S HAPPENED MANY, MANY TIMES.

I THINK THAT'S WHAT CAUSED THE ADDITIONAL QUANTITY FROM THE 175 ON THE DESIGN OF THE BID, IS IT WAS CHANGED TO A ONE TO ONE AND THEY DIDN'T -- THEY ISSUED A SUP ORDER FOR THAT ADDITIONAL YARDAGE BUT NOT THE CHANGE IN THE SLOPE.

Q REFERRING TO PART 2 OF EXHIBIT 1, WHICH IS ENTITLED

"PROCON CORPORATION BID NOTES AND CALCULATIONS, CLAY HILLS PASS PROJECT," THERE IS A SHEET IN HERE ENTITLED "PRODUCTION WORK SHEET I" FOR ROADWAY EXCAVATION. IS THIS WHERE YOU CALCULATE OUT WHAT IT'S -- HOW YOU COME UP WITH YOUR BID PRICE?

A ROUGHLY, YEAH.

Q DO YOU HAVE ANY OTHER INFORMATION THAT RELATES TO THAT BID PRICE?

A I USUALLY HAVE OTHER ADDITIONAL NOTES, AND I'VE TRIED TO FIND THEM, AND THE ATTORNEYS MAY HAVE THEM, I DON'T KNOW. I GAVE EVERYTHING TO THEM. IT'S BEEN FOUR YEARS AGO SINCE I DID THAT AND IT'S HARD TO REMEMBER. BUT I USUALLY HAVE ADDITIONAL NOTES, ESPECIALLY ANY CALL-IN OR PHONE CALLS THAT WE TRY TO ANTICIPATE AND DO A ROUGH ESTIMATE, AND GET EVERYTHING DONE SO YOU DON'T DO IT THE LAST DAY WHEN YOU MAKE YOUR ADJUSTMENTS FROM THAT POINT.

Q ARE THESE YOUR NOTES?

A YES.

Q DID ANYONE ELSE DETERMINE A BID ON THIS?

A I THINK LARRY FILLMORE WORKED ON IT ALSO. USUALLY DID TWO WORK-UPS AND COMPARED THEM, AND THEN SUBMITTED THE ONE WE THOUGHT WAS THE BEST.

Q THERE IS A NOTE HERE ON THE SECOND PAGE OF THIS WORK-UP FOR ROADWAY EXCAVATION, SAYS "NOTE 2. USE ACCESS PRODUCTION ON SLIVER CUT WITH B.H." WHAT WOULD THAT BE?

1 A BACKHOE.

2 Q BACKHOE. "USE ONE DOZER DOZING TO OTHER DOZER INTO
3 STOCKPILE. TO BE MOVED, APPROXIMATELY 20,000 CUBIC YARDS,
4 MOVED TWICE." NOW, FROM THAT 20,000 YARDS WE COULD DETERMINE
5 WHETHER OR NOT YOU WERE FIGURING A ONE-HALF TO ONE OR ONE TO
6 ONE, COULDN'T WE?

7 A I DON'T THINK WE PROBABLY COULD, BUT YOU COULD
8 MAYBE TRY TO FIGURE THAT. I JUST ANTICIPATED THAT THERE WAS
9 APPROXIMATELY 20,000 YARDS THAT WE'D HAVE TO MOVE. TWICE. I
10 DON'T RECALL.

11 Q NOW, DID YOU PLAN TO MOVE ALL THE MATERIAL IN THE
12 SLIVER CUT TWICE?

13 A DOWN TO A CERTAIN LEVEL I BELIEVE.

14 Q SO THE 20,000 YARDS WOULDN'T REPRESENT ALL OF THE
15 MATERIAL THAT YOU EXPECTED TO TAKE OUT OF THE SLIVER CUT
16 THEN?

17 A IT WAS ALL THE MATERIAL. WHAT WE HAD TO DO WAS
18 REACH UP WITH THE BACKHOE AND TAKE IT DOWN TO WHAT WE HAD
19 THOUGHT WOULD BE AN AREA THAT WAS WIDE ENOUGH TO, YOU KNOW,
20 START USING A DOZER. SO WE DIDN'T OVERCUT. WE DIDN'T WANT
21 TO OVERCUT, BECAUSE YOU DON'T GET PAID FOR OVERCUT.

22 Q UH-HUH. WELL, WOULD YOU AGREE WITH ME THAT BASED
23 ON THE DOCUMENTS WE'VE LOOKED AT HERE YOU CAN'T DETERMINE
24 WHAT YOU ACTUALLY WERE PLANNING ON, WHETHER IT WAS A ONE TO
25 ONE OR A HALF TO ONE?

1 A WELL, FROM THE DOCUMENTS THERE AND FROM WHAT MY
2 RECOLLECTION WAS IS THE FACT THAT WE DIDN'T BID IT OTHER THAN
3 WHAT THE DRAWINGS SHOWED WE WERE GOING TO BID, ON A ONE TO
4 ONE, UNTIL WE GET CORRECTED BY MR. KIRKHAM.

5 Q BUT DID YOU MAKE IT CLEAR TO MR. KIRKHAM IN THIS
6 ALLEGED CONVERSATION THAT YOU WERE GOING TO BID THE ROADWAY
7 EXCAVATION AND THE SLIVER CUT ON A HALF TO ONE?

8 MR. BOSTWICK: I THINK HE'S ALREADY ANSWERED THAT.

9 MR. FORD: WELL, I DIDN'T HEAR HIM ANSWER IT YES OR
0 NO.

1 MR. BOSTWICK: HE INDICATED THAT HE ASKED
2 SPECIFICALLY WHETHER OR NOT THEY SHOULD GO WITH WHAT HE TOLD
3 THEM ON SITE, OR WHETHER THEY SHOULD GO WITH THE PLANS, AND
4 THEY WERE TOLD TO BID IT ON THE PLANS.

5 Q IS THAT YOUR ANSWER?

6 A HE SAID, "TO BE SAFE BID AS DRAWN." MR. KIRKHAM
7 MADE A STATEMENT AFTER WE STARTED ABOUT THE DESIGN ERROR.

8 Q OKAY. ON PAGE 10 OF EXHIBIT 1, PART 1 IT'S CALLED
9 "DESCRIBE SITE." THEN YOU'VE GOT SOME NOTES HERE. IT SAYS
0 "HIGH DEGREE OF ERROSION, CUT AREA BEGINNING AT SLIVER CUT
1 APPROXIMATELY 200 FEET ABOVE EXISTING ROAD. MAINTAIN
2 APPROXIMATELY ONE TO ONE SLOPE. PLANS VERY VAGUE AND
3 CONFUSING. ACCESS ROAD MUST BE BUILT TO BOTTOM OF FILL USING
4 MATERIAL ON EAST END OF CUT." YOU WOULD AGREE WITH ME THAT
5 THAT VERY CLEARLY SAYS ONE TO ONE?

1 A I THINK THAT'S THE BID NOTES THAT I TOOK IN THE
2 FIELD OR, YOU KNOW, THAT I RECALL FROM THE FIELD WHEN I CAME
3 HOME. THAT'S WHAT MR. KIRKHAM HAD INDICATED, AS I INDICATED.

4 Q ON THE NEXT PAGE, IS THIS YOUR HANDWRITING?

5 A I BELIEVE SO, YEAH.

6 Q YOU HAVE A DIAGRAM SHOWING THE CUT AREA, AND THIS
7 IS THE SLIVER CUT ON THE LEFT HERE, ISN'T IT?

8 A UH-HUH.

9 Q SAYS "200 FEET TOP, ONE TO ONE SLOPE"?

10 A UH-HUH. IT'S ALL FROM THE BID TOUR.

11 Q WELL, AS A RESULT OF YOUR CONVERSATIONS WITH
12 KIRKHAM, AND SPECIFICALLY THE FACT THAT HE TOLD YOU THAT IT
13 WAS GOING TO BE REMOVED ON A ONE TO ONE SLOPE, DID YOU
14 ANTICIPATE THAT THE ROADWAY EXCAVATION ITEM WOULD OVERRUN?

15 A NO.

16 Q YOU KNEW THE PLANS WERE DRAWN ON A HALF TO ONE?

17 A I FIGURED THAT IF THEY WERE GOING TO ISSUE -- IF IT
18 WAS COMING OUT ONE TO ONE THEY WOULD ISSUE AN ADDENDUM THAT
19 WOULD INDICATE ANY OVERRUN, IF IT WAS A CHANGE IN THE PLANS
20 FIGURED THERE WOULD BE AN OVERRUN AND THEY WOULD ISSUE AN
21 ADDENDUM STATING THE FACT. AND THEY NORMALLY DO. AND I'VE
22 BEEN INVOLVED WITH PROJECTS SINCE THEN THAT THEY DO COME OUT
23 WITH ADDITIONAL COMPLETE SET OF BID DOCUMENTS.

24 Q EVEN THOUGH THE STANDARD SPECIFICATIONS ALLOW THEM
25 TO OVERRUN AN ITEM BY 25 PERCENT YOU'RE TELLING ME THAT THEIR

PRACTICE IS TO ISSUE AN ADDENDUM?

A ISSUE AN ADDENDUM IF THEY CHANGE THE PLANS FROM A SLOPE OF A HALF TO ONE TO A ONE TO ONE, WHICH MAY AFFECT THE TOTAL QUANTITY, ANTICIPATED QUANTITY, THEN THEY WOULD USUALLY ISSUE THE ADDENDUM OUT AND CHANGE THE QUANTITIES ALSO WITHIN THE ADDENDUM NORMALLY. IF IT WAS UNCHANGED THEN THEY WOULDN'T WORRY ABOUT IT.

Q WELL, THAT'S A DIFFERENT U.D.O.T. THAN I'M FAMILIAR WITH. NOW, DID YOU TALK TO HIM ABOUT WHO THE PREVIOUS CONTRACTOR WAS THAT WORKED IN THAT AREA?

A I BELIEVE WE TALKED TO HIM, YES, ABOUT WHAT THE PREVIOUS CONTRACTOR -- HE VOLUNTEERED THE INFORMATION.

Q OKAY. TELL ME WHAT HE SAID AS NEAR AS YOU RECALL.

A AS I RECALL, WE ASKED IF THERE WAS GOING TO BE ANY SHOOTING OR BLASTING REQUIRED. HE SAID THE PREVIOUS CONTRACTOR -- WE WERE IN HIS WHITE BRONCO AND GAVE US A TOUR FROM ONE END TO THE OTHER, AND TOLD US THAT THERE WAS VARIOUS CONTRACTORS AND THAT HIT VARIOUS MATERIALS IN THIS AREA. FIFE CONSTRUCTION WORKED IN THE AREA AND DID NOT HAVE TO BLAST. HE SAID THEY RIPPED IT WITH DOZERS AND IT WAS APPROXIMATELY 10 YEARS AGO, 10 YEARS PRIOR. AND HE TOOK US UP TO THE WEST SO MANY MILES AND SHOWED US WHERE I BELIEVE STRONG WORKED AND STRONG HAD TO BLAST. AND THEN HE TOOK US TO THE EAST AND SHOWED US WHERE THEY HAD TO BLAST THROUGH THE MOUNTAIN. AND HE SPECIFICALLY SAID THROUGH THIS AREA THEY

DID NOT, THE CONTRACTOR DID NOT HAVE TO BLAST, AND THAT HE RIPPED IT WITH DOZERS. AND THAT WE WOULD ANTICIPATE FINDING FLOATERS IN THERE, BUT THEY DIDN'T ANTICIPATE ANY LARGE, UNMANAGEABLE MATERIAL THAT WOULD HAVE TO BE SHOT.

Q DID YOU ASK HIM WHAT KIND OF DOZERS THAT HE USED?

A AS I RECALL HE SAID -- I DON'T RECALL THE SPECIFIC -- THE TYPE OF THE DOZERS OTHER THAN HE WAS SAYING D-8'S AND D-9'S.

Q WELL, THAT WOULD BE QUITE CRITICAL, WOULDN'T IT, TO KNOW WHAT SIZE DOZERS?

A NOT NECESSARILY, BECAUSE YOU'RE MOVING A LOT MORE MATERIAL IF HE'S USING A D-9 DOZER. AND THEY HAD TO MOVE A LOT MORE MATERIAL, THERE WAS A MILLION YARDS OF DIRT IN THERE, OR WHATEVER; SUBSTANTIALLY MORE THAN WE WERE MOVING. IT WAS ORIGINAL CUT. AND SO YOU CAN PLAN YOUR DOZERS BY THE EFFICIENCY FACTOR OF -- IF YOU GOT TO MOVE A LOT OF MATERIAL AND YOU'RE NOT DOING A SLIVER CUT AND -- I MEAN, THERE'S LOTS OF FACTORS WHICH AFFECT THE TYPE OF EQUIPMENT. IF HE SAID THAT THEY COULDN'T RIP IT WITH ANYTHING BUT A D-9 THEN, YES, THAT WOULD BE A DIFFERENCE, BUT HE DIDN'T SAY THAT.

Q WELL, IS THERE A DIFFERENCE IN RIPPING CAPABILITY BETWEEN A D-8 AND A D-9?

A YES, THERE IS.

Q IS IT A SIGNIFICANT DIFFERENCE?

A IT'S A CERTAIN PERCENTAGE. I BELIEVE A 20 PERCENT

1 FACTOR. DEPENDS ON THE TYPE MATERIAL AND -- YEAH, THERE'S A
2 DIFFERENCE. IT'S A BIGGER MACHINE, IT'S MORE WEIGHT, MORE
3 HORSEPOWER.

4 Q AND IF THE PREVIOUS CONTRACTOR WAS TAKING OUT A
5 FULL SIZE CUT HE ISN'T JUST LIMITED TO RIPPING IN ONE
6 DIRECTION, IS HE?

7 A NO, HE'S NOT. AND ALSO HE'S NOT WORKING ON A SIDE
8 CUT, WHICH A D-9 MAY NOT WORK AS WELL AS A D-8 IF THE
9 MATERIAL IS VERY HARD AND A BIGGER CAT CAN'T WORK ON THAT
10 TYPE OF A SIDE HILL AND LIMITED WORK AREA. SO YOU HAVE TO
11 WORK -- DETERMINE THE FACTOR AS IF THE DOZER, IF THE MACHINE
12 FITS THE JOB AND WHETHER THE MACHINE CAN RIP IT OR NOT. AND
13 IF SOMEBODY TELLS YOU THAT YOU'RE NOT GOING TO HAVE TO RIP,
14 OTHER THAN TO RIP THE SMALL THREE FOOT BOULDERS OUT OF THE
15 JOB, AND THAT THERE ARE FLOATERS IN THE MATERIAL AND THAT
16 THEY BREAK UP. HE TOOK A BOULDER AND THREW IT ON THE HIGHWAY
17 AND IT BROKE, SHATTERED, THEN YOU DON'T ANTICIPATE MATERIAL
18 THAT WON'T BREAK UP WITH A RIPPER.

19 Q BUT WILL YOU AGREE WITH ME THAT IF THE PREVIOUS
20 CONTRACTOR RIPPED THE MATERIAL SUCCESSFULLY WITH A D-9 CAT --

21 A AND D-8, HE HAD BOTH.

22 Q HAVE YOU TALKED TO THE PREVIOUS CONTRACTOR?

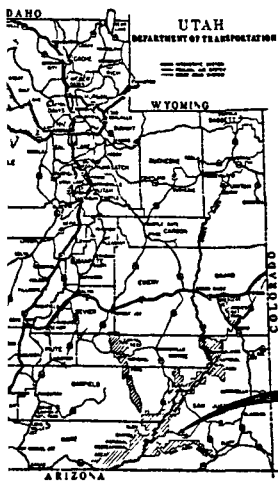
23 A YES.

24 Q WHAT DID HE TELL YOU?

25 A TOLD US THEY HAD BOTH D-8'S AND D-9'S. THEY DIDN'T

Ex. 2-p

COVER SHEET & SHEETS 2, 3 & 5 ONLY



UTAH DEPARTMENT OF TRANSPORTATION

PLANS OF PROPOSED STATE ROAD

FEDERAL AID PROJECT

CLAY HILLS PASS

ER-052(1)

SAN JUAN COUNTY

GRADING, DRAINAGE & SURFACING

LENGTH 0.428 MILE

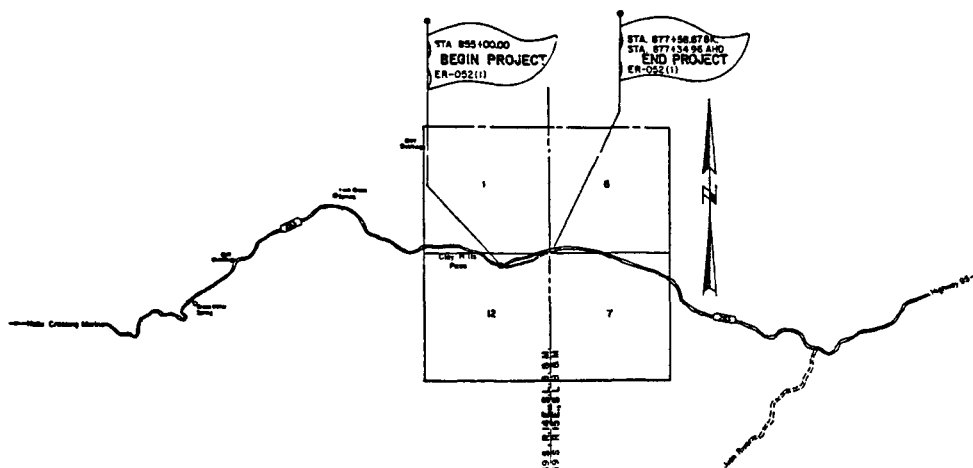
BEGIN M.P. 15.17
END M.P. 15.60

Revised 1 5 66

FED. ROAD DIST. NO.	UTAH	PROJ. NO.	SHEET NO.
UTAH	UTAH	ER-052(1)	1

INDEX TO SHEETS	
SHEET NO.	DESCRIPTION
1	TITLE SHEET
2A	TYPICAL INSTALLATION & DETAIL
3	SUMMARY SHEET
4	TRAFFIC CONTROL, MATRIX AND CHASING DETAIL
4B	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4C	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4D	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4E	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4F	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4G	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4H	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4I	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4J	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4K	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4L	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4M	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4N	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4O	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4P	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4Q	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4R	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4S	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4T	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4U	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4V	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4W	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4X	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4Y	DETAIL, DRAINAGE OPERATION & LANE CLOSURE
4Z	DETAIL, DRAINAGE OPERATION & LANE CLOSURE

STANDARD DRAWINGS		
DRAWING NO.	DESCRIPTION	DATE
705-1	FALL HEIGHTS FOR PIPE CULVERTS	2/28/60
705-2	R/W MARKER	3/2/60
705-3	DEL. HEIGHTS OTHER THAN INTERSTATE	7/27/60
705-4	BEAM GUARDRAIL	7/28/60
705-5	GUARDRAIL APPROACH ELEMENT INSTALL	12/2/60
705-6	CONST. SIGNING CHANNELIZATION DEVICES	5/18/62
705-7	CONSTRUCTION NOTIFICATION SIGNS	5/2/62
705-8	CONSTRUCTION SIGNING BARRICADES	7/8/62
705-9	SUPERELEVATION AND WIDENING	11/23/65
705-10	HIGHWAY SIGNS OTHER THAN FREEWAYS	12/30/65



UTAH
DEPARTMENT OF TRANSPORTATION
11/11/65
5866

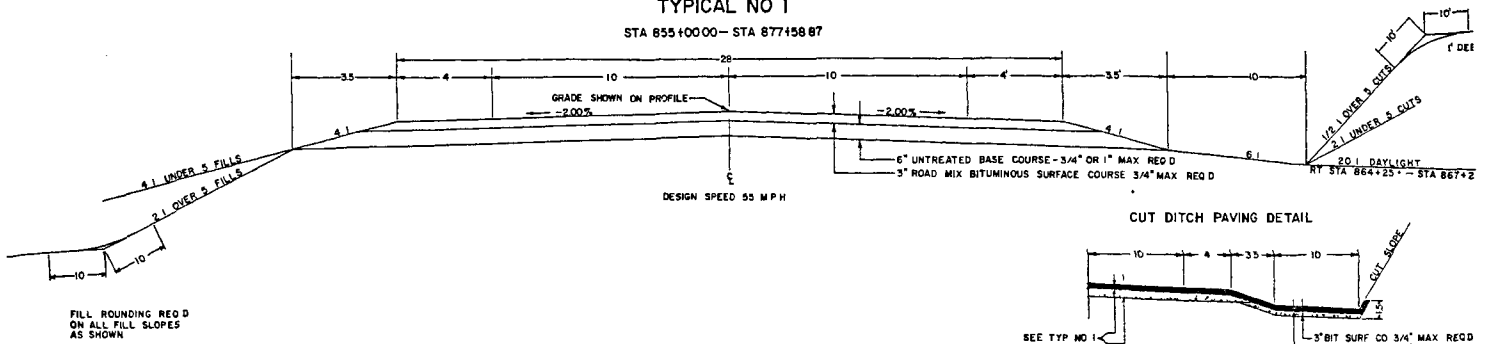
UTAH DEPARTMENT OF TRANSPORTATION	
RECOMMENDED FOR APPROVAL 10/31/65	10/31/65
RECOMMENDED FOR APPROVAL 10/31/65	
ENGINEER FOR RECONSTRUCTION	
APPROVED	11/11/65
ASSISTANT DIRECTOR	
U.S. DEPARTMENT OF TRANSPORTATION	
FEDERAL HIGHWAY ADMINISTRATION	
APPROVED	

TYPICAL SECTION

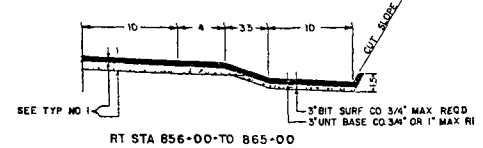
TYPICAL NO 1

STA 855+00.00 - STA 877+58.87

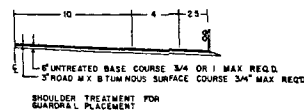
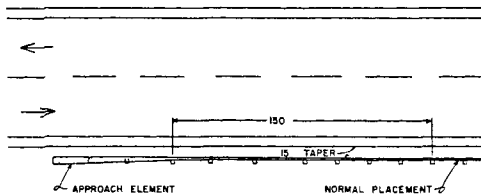
PROVIDE CUT SLOPE RO
ON ALL CUTS AS SHOWN
SURFACE DITCH REQ'D W
NATURAL DRAINAGE IS TO
CUT IF SUFFICIENT TO SEC



CUT DITCH PAVING DETAIL

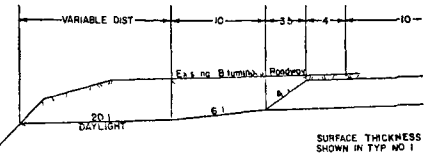


GUARDRAIL DETAIL



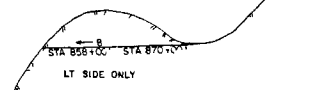
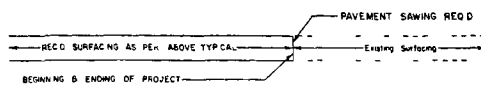
TYPICAL NO 2

STA 855+75 - STA 869+25
LEFT SIDE ONLY



NOTE: The existing Bituminous Material shall be disposed of as directed by the project Engineer.

SPECIAL TREATMENT AT BEG & END OF PROJECT



SUPERELEVATE CURVES IN ACCORDANCE WITH STD DWG NO 805

UTAH DEPARTMENT OF TRANSPORTATION	CLAY HILLS PASS
DISTRICT FOUR PRICE UTAM	
ROADWAY DESIGN	
TYPICAL SECTION SHEET	
DESIGNED BY: J. H. H. 1/85	REVISED BY: J. H. H. 1/85
CHECKED BY: J. H. H. 1/85	REVISED BY: J. H. H. 1/85
APPROVED BY: J. H. H. 1/85	REVISED BY: J. H. H. 1/85
DATE: 1/85	DATE: 1/85
PROJECT NO: 8521	SHEET NO: 1

NO	BY	DATE	TYPE	REVISION
1	J. H. H.	1/85	DESIGN	REVISED

LINEAR SUMMARY

[illegible][illegible]

QUANTITY	UNIT	DESCRIPTION	CSR		STA'S, B's/R REMARKS
			BK	PG	
0	LUMP	MOBILIZATION			
3.000	HOUR	FLAGGING			
48	EACH	DELIMITATORS - TYPE 1			IN ACCORDANCE WITH STD DWG. NO 728-2
56	LN FY	PAVEMENT SAWING (BITUMINOUS)			SEE SPECIAL PROVISION
12	EACH	RIGHT-OF-WAY MARKERS			SEE STD. DWG. NO 723-1
1.000	HOUR	EQUAL OPPORTUNITY TRAINING			
5	ACRE	SEEDING			SEED ALL FILL SLOPE
9	ACRE	MULCHING - TYPE "B"			MULCH ALL SEEDED AREA

STATIONS		LENGTH MILES	GALLONS PER MILE	HIGHWAY TRAFFIC PAINT	CONST. SOURCE REFER.	REMARKS
FROM	TO					
85+00	877+58.87	0.425	16	13.5		4" WHITE BOTT. SH-D LINE
85+00	877+58.87	0.425	16	13.5		DEL. 4" YELLOW CENTER LINE
TOTAL				27		
USE				27		

FROM STATION	TO STATION	BEAM GUARD RAIL		GUARD RAIL APPROACH ELEMENTS		CONST. SOURCE REFER	REMARKS
		LIN. FT.		EACH			
		LT.	RT.	LT.	RT.		
866+50	877+50	1110		2			
857+50	877+50			1000		2	
SUB-TOTAL		1110	1000	2	2		
TOTAL		2110		4			
USE		2110		4			

NAME		LBS LIVE SEED PER ACRE	
BOTANICAL	COMMON	METHOD "A"	METHOD "B"
<i>Asparagus hypenoides</i>	Indian Ricegrass		3
<i>Rhus copallina</i>	Four-Wing Saltbush		2
<i>Medicago officinalis</i>	Yellow Sweetclover		1/2

FROM STATION	TO STATION	X-ING W/ HEIGHT OF COVER	CORRUGATED STEEL PIPE CULVERT	PIPE ARCHES	METAL END SECTIONS	CONST SOURCE REFER.	REMARKS
			LINEAR FEET	LINEAR FEET	EACH		
885+00		30"	0	250	24" 36" 48" 60" 72"	2	SPUR DIKE REQ'D ON INLET
TOTAL			250		2		
USE			250		2		

FROM STATION	TO STATION	LENGTH	GRAVEL MATERIAL						BITUMINOUS MATERIAL						ADDITIVES		REMARKS	
			ROAD MIX BITUMINOUS SURFACE COURSE			UNTREATED BASE COURSE			BITUMINOUS MATERIAL			BITUMINOUS MATERIAL			TACK COAT			
			3/4" MAX	1 1/2" MAX	138 LBS. PER CU. FT.	3/4" MAX	1 1/2" MAX	138 LBS. PER CU. FT.	GRADE MC-800	5.5%	140 TO 160 GR. MC-27	140 TO 160 GR. MC-27	140 TO 160 GR. MC-27	140 TO 160 GR. MC-27	140 TO 160 GR. MC-27	140 TO 160 GR. MC-27		140 TO 160 GR. MC-27
			FEET	WIDTH	DEPTH	TONS	WIDTH	DEPTH	TONS	WIDTH	TONS	WIDTH	TONS	WIDTH	TONS	POUNDS		
5+00.00	877+58.87	2,258.87	29' 17"	0.25'	1445	32.64	0.50	2777	29' 17"	75.32	32.64	9.69					QUANTITY SHOWN INCLUDES MATERIAL FOR PAVED CUT DITCH RT. OF 856+00! THRU 865+00!	
TOTAL					1445		2777			75.32		9.69			378.61			
USE					1450		2780			76		10			380			

ION ON	EMB.		P-HOWAY EXC.		REMARKS
	CU YDS.	CU YDS.	CU YDS.	CU YDS.	
889+50			175.377		NOTE: OF THE 175.377 CU YD OF ROADWAY EXC. 128+10 CU YD COMES FROM THE GRADE, 4.261 CU YD FROM DAYLIGHTING LT. & RT. SIDE AND 5,000 CU YD FROM THE SLIDE ON THE TOE OF LT. FILL SLOPE. THERE WILL BE A 3/4" SWELL IN THE SOLID ROCK AT STA. 885+50 TO 892+00; AND A SHRINK OF 3" IN THE MATERIAL BETWEEN STA. 892+00 TO 897+00. WASTE EXCESS ROADWAY EXCAVATION RIGHT OF 5" - 894+75 TO 897+25 (SEE SPECIAL PROVISION)
877+00	72.947				
878+00	72.947		175.377		
879+00			175.400		
880+00	72.947		175.400		

UTAH DEPARTMENT OF TRANSPORTATION			
DISTRICT FOUR PRICE, UTAH			
ROADWAY DESIGN			
CLAY HILLS PASS			
SUMMARY SHEET			
DESIGN BY R.H. 1/85	CHECK BY C.H. 2/85	REVIEW	
DESIGN BY R.H. 1/85	CHECK BY R.H. 1/85	DESIGN	
APPROVED BY [Signature]		SAN JUAN	
ER-052(11)		SHEET NO. 3	

Ex. 3-p

PROCON CORPORATION
SUPPLEMENTAL SPECIFICATIONS

SPECIAL PROVISIONS

NAME Clay Hills Pass
PROJECT NO. ER-052(1)
COUNTY San Juan
CONTRACTOR Procon Corporation
BID OPENING February 4, 1986
Date

SPECIAL PROVISION
SHEET NO. 11,
CONCERNING WASTE
MATERIAL COMPACTION
AND SHEET DEFINING
APPLICABLE
SPECIFICATIONS
ATTACHED. OTHER
PAGES DELETED.



ENCLOSURE, N. 1
PLAINTIFF'S
EXHIBIT
3-P
8819975868

Applicable Specifications and Corrections for Addendum No. 2

The State of Utah Standard Specifications for Road and Bridge Construction, Edition of 1979, and Addendum No. 2 of February 1, 1985, will apply on this project.

Corrections to Table of Contents of Addendum No. 2

SECTION 625 CONSTRUCTION SIGNS AND WARNING LIGHTS: Change the Subsection "625.11" to "625.01."

Corrections to Addendum No. 2

106.10 Buy America: Delete the word "Amerdican" and substitute the word "American" in the first sentence of the first paragraph.

107.25 Noise and Vibration Control: Add the following at the end of Article 2, paragraph a: "55 dBA in nighttime (9 p.m. - 7 a.m.)."

404.08 Basis of Payment: Delete the word "necessaary" and substitute the word "necessary" in the first sentence of the first paragraph.

506.12 Cold Weather Concreting: Delete the number "70" and substitute the number "60" in the first sentence of the second paragraph.

625.11 Signs: Correct this heading to read "625.01 Signs."

SPECIAL PROVISION

ER-052(1)

Compaction of Waste Material

Roadway excavation placed in the waste area designated on the plans shall be compacted to 90 percent of maximum laboratory density. The maximum laboratory density shall be determined in accordance with AASHTO Designation T-99 Method D.

This item of work shall not be paid for separately, but shall be considered a part of the "Roadway Excavation", and no additional compensation will be allowed.

11/21/85
0120V

Ex. 5-p

SECTION 102—BIDDING REQUIREMENTS AND CONDITIONS

102.01 Prequalification of Bidders: Prior to submitting a bid, the bidder must file an experience questionnaire and confidential financial statement on forms furnished by the Department. The statement shall conform to the requirements for prequalification of bidders on state highway projects as adopted by the Commission. All bids must be submitted in the same name as on the prequalification form.

Bidders intending to consistently submit proposals shall prequalify at least once a year. However, prequalification may be changed during that period upon the submission of additional favorable reports or upon unsatisfactory performance. Qualification shall authorize a contractor to bid on individual projects of a given size or for a particular kind of work. Work may not be awarded if the cost of such work exceeds the amount authorized in the Contractor prequalification rating.

102.02 Contents of Proposal Forms: Upon request, the Department will furnish the prequalified bidder with a proposal form. This form will state the location and description of the contemplated construction and will show the approximate estimate of the various quantities and kinds of work to be performed or materials to be furnished, and will have a schedule of items for which unit bid prices are invited. The proposal form will state the time in which the work must be completed, the amount of the proposal guaranty, and the date, time, and place of the opening of proposals. The form will also include any special provisions or requirements which vary from or are not contained in the Standard Specifications.

All papers bound with or attached to the proposal form are considered a part thereof and must not be detached or altered when the proposal is submitted.

The plans, specifications, and other documents, designated in the proposal form, will be considered a part of the proposal whether attached or not.

The prospective bidder will be required to pay the Department the sum stated in the Notice to Contractors for each copy of the proposal form and each set of plans.

102.03 Issuance of Proposals: The Department reserves the right to disqualify or refuse to issue a proposal if a bidder is in default for any of the following reasons:

(a) Lack of competency and adequate machinery, plant, and other equipment, as revealed by the financial statement and experience questionnaires required under Subsection 102.01.

(b) Uncompleted work which, in the judgment of the Department, might hinder or prevent the prompt completion of additional work if awarded.

(c) Failure to pay, or satisfactorily settle, all bills due for labor and material on former contracts.

(d) Failure to comply with any qualification regulations of the Department.

(e) Default under previous contracts.

(f) Unsatisfactory performance record as shown by past work for the Department judged from the standpoint of workmanship and progress.

102.04 Interpretation of Quantities in Schedule: The quantities appearing in the bid schedule are approximate only and are prepared for the comparison of bids. Payment to the Contractor will be made only for the actual quantities of work performed and accepted or materials furnished in accordance with the contract. The scheduled quantities of work to be done and materials to be furnished may each be increased, decreased, or omitted as hereinafter provided.

102.05 Examination of Plans, Specifications, Special Provisions and Site of Work: The Department will prepare plans and specifications giving such directions as will enable any competent contractor to complete the work. The bidder is expected to examine carefully the site of the proposed work, the proposal, plans, specifications, supplemental specifications, special provisions, and contract forms before submitting a proposal. Furthermore, the materials report, soil survey plans and profiles, and test data pertaining to the proposed work are available for the bidder's inspection at the Materials and Research Section or the District Office. The submission of

a bid shall be considered prima facie evidence that the bidder has made examinations and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the plans, specifications, supplemental specifications, special provisions, and contract.

102.06 Preparation of Proposal: The bidder shall submit his proposal upon the forms furnished by the Department. The bidder shall specify a unit price in figures, for each pay item for which a quantity is given, and shall also show the products of the respective unit prices and quantities written in figures in the column provided for that purpose, and the total amount of the proposal obtained by adding the amounts of the several items.

All the figures shall be in ink or typed

When an item in the proposal contains a choice to be made by the bidder, the bidder shall indicate his choice in accordance with the specifications for that particular item, and thereafter no further choice will be permitted except for extenuating circumstances satisfactory to the Department.

The bidder's proposal must be signed with ink by the individual, by one or more members of the partnership, by one or more members or officers of each firm representing a joint venture, or by one or more officers of a corporation or by an agent of the Contractor legally qualified and acceptable to the State. If the proposal is made by an individual, his name and post office address must be shown; by a partnership, the name and post office address of each partnership member must be shown; as a joint venture, the name and post office address of each member or officer of the firms represented by a joint venture must be shown; by a corporation, the name of the corporation and the business address of its corporate officials must be shown.

102.07 Irregular Proposals: Proposals shall be considered irregular and may be rejected for the following reasons:

(a) If the proposal is on a form other than that furnished by the Department; or if the form is altered or any part thereof is detached.

b) If there are unauthorized additions conditional or al-

ternate bids, or irregularities of any kind which may tend to make the proposal incomplete, indefinite, or ambiguous as to its meaning.

(c) If the bidder adds any provisions reserving the right to accept or reject an award, or to enter into a contract pursuant to an award.

(d) If the unit prices contained in the bid schedule are obviously unbalanced, either in excess of, or below reasonable cost-analysis values.

(e) If the proposal does not contain a unit price for each pay item listed except in the case of authorized alternate pay items.

(f) Any erasure or alteration of figures of unit prices not initialed in ink by the bidder.

(g) If the bidder violates any provisions of the prequalification requirement as to the type of work, the aggregate amount of work, falsification of any prequalification form, or any other provision, or requirements contained in the prequalification rules and regulations.

102.08 Proposal Guaranty: No proposal will be considered unless accompanied by a guaranty in the form of a certified check, cashier's check or guaranty bond for not less than 5 percent of the total amount of the bid made payable to the Utah Department of Transportation. A proposal guaranty bond shall be made on the form included in the proposal.

102.09 Delivery of Proposals: Each proposal should be submitted in a special envelope furnished by the Department. The blank spaces on the envelope shall be filled in correctly so as to clearly indicate its contents. When an envelope other than the special one furnished by the Department is used, it must be of the same general size and shape and be similarly marked to clearly indicate its contents. When sent by mail, the sealed proposal must be addressed to the Department at the address and in care of the official in whose office the bids are to be received. All proposals shall be filed prior to the time and at the place specified in the Notice to Contractors. Proposals received after the time for opening of bids will be returned to the bidder unopened.

103.04 Return of Proposal Guaranty: All proposal guaranties, except those of the two lowest bidders, will be returned immediately following the opening and checking of the proposals. The retained proposal guaranty of the second lowest bidder will be returned within 15 days following the award of contract or within 30 days after the opening of the bids, and that of the successful bidder will be returned after satisfactory bonds have been furnished and the contract has been executed.

103.05 Requirement of Contract Bonds: At the time of the execution of the contract, the successful bidder shall furnish a performance bond and a payment bond in a sum equal to the full amount of the contract. The bonds shall be on forms provided by the Department.

103.06 Execution and Approval of Contract: The contract shall be signed by the successful bidder and returned together with the contract bonds within 10 days after the contract has been awarded. If the contract is not executed by the Commission within 15 days after receiving signed contracts and bonds, the bidder shall have the right to withdraw his bid without penalty. No contract shall be considered as effective until it has been fully executed by all of the parties thereto.

103.07 Failure to Execute Contract: Failure to execute contract and file acceptable bonds within 10 days after the contract has been awarded shall be just cause for the cancellation of the award and the forfeiture of the proposal guaranty which shall become the property of the Department, not as a penalty, but in liquidation of damages sustained. Award may then be made to the next lowest responsible bidder or the work may be readvertised and constructed under contract or otherwise, as the Department may decide.

SECTION 104—SCOPE OF WORK

104.01 Intent of Contract: The intent of the contract is to provide for the construction and completion in every detail of the work described. The Contractor shall furnish all labor, materials, equipment, tools, transportation and supplies required to complete the work in accordance with the plans, specifications, special provisions, and terms of the contract.

104.02 Alteration of Plans or Character of Work: The Engineer reserves the right to make at any time during the progress of the work, such increases or decreases in quantities and such alterations in the details of construction, including alterations in the grade or alignment of the road or structure or both, and the elimination of one or more items as may be found necessary or desirable. Such alterations shall not be considered as a waiver of any conditions of the contract nor invalidate any of the provisions thereof nor release the surety. The Contractor agrees to accept the work as altered the same as if it had been a part of the original contract, provided, however, that if demand is made in writing by either party to the contract, a supplemental agreement will be necessary before any alteration is made which involves any one of the following:

1. An extension or shortening of the length of the project of more than 25%.
2. An increase or decrease of more than 25% of the total cost of the work, calculated from the original proposal quantities at the unit contract prices.
3. An increase or decrease of more than 25% in the quantity of any major contract item except "Excavation for Structures" and "Piles."
4. A change in the nature of the design or in the character of construction which measurably increases or decreases the unit cost of performing any item of the work.

Supplemental agreements may be made without obligation to notify the bonding company.

In all other cases, the work involved in any changes shall be performed on the basis of the contract unit prices and no supplemental agreement shall be necessary.

When alterations of plans or character of work occur requiring a supplemental agreement, the agreement shall be prepared, specifying the work to be done, adjustment and/or extension of contract time, if any, and the basis of compensation for such work. *The Contractor shall proceed with the work upon receipt of an approved supplemental agreement, or when*

ordered in writing or verbally by the Engineer. Verbal orders must be confirmed in writing within one working day.

The adjustment in compensation provided for under conditions (2) and (3) above, in the event of an increase, shall be computed on the amounts or quantities in excess of 25% allowable alteration. In the event of a decrease, any adjustments in payment shall apply to the quantity or quantities of work actually performed.

In the case of decreased quantities of work, no allowance shall be made in the supplemental agreement for anticipated profits.

Written requests for a supplemental agreement under condition (4) shall set forth in detail the particulars and character by which the work was changed and by what amounts the unit costs of the contract items will be altered. The failure of the Engineer to recognize a change in the character of the work when ordering alterations in the work shall in no way be construed as relieving the Contractor from his duty and responsibility for filing a request for supplemental agreement.

If a request for additional compensation is made by the Contractor and the Engineer does not consider that a change, as ordered, will measurably increase or decrease the unit cost of performing the work, he may order the work to proceed at the contract prices. The validity of the claim will be considered in accordance with provisions in Subsection 105.17.

When it is determined by the Engineer that under the provisions of this subsection, a supplemental agreement is justified and an agreement satisfactory to both parties cannot be made, the Engineer may determine an amount which he feels is fair and equitable, and order the Contractor to proceed accordingly, or may order the work performed on a force account basis or cancel the work from the contract. If the work is performed at the adjusted price as established by the Engineer and the Contractor considers additional compensation is due him, he may request further consideration as provided in Article 105.17.

Any delays attributable to approval of changes from design plans that may appear necessary or desirable during construc-

tion shall not be cause for payment to the Contractor for any additional expense incurred by such delays.

104.03 Extra Work: The Contractor shall perform work, for which there is no price included in the contract, whenever it is deemed necessary or desirable in order to complete fully the work as contemplated. Such work shall be performed in accordance with the specifications and as directed, and will be paid for as provided under Subsection 109.04.

104.04 Maintenance of Traffic: Unless otherwise provided, the road while under construction shall be kept open to public traffic by the Contractor. Pot holes and other irregularities that develop under traffic shall be repaired as directed. The Contractor shall also provide and maintain in a safe and usable condition temporary connections or crossings and intersections with trails, roads, streets, businesses, parking lots, residences, garages and farms. The Contractor shall maintain a smooth-riding, dust-controlled surface at all times, 24 hours a day and 7 days a week.

Watering shall be applied in the amount ordered and/or bituminous material shall be applied as directed for dust control.

Bituminous material *ordered* by the Engineer for dust control will be paid for at the contract unit price for bituminous material shown in the proposal. If no item for bituminous material is shown in the proposal, the work will be paid for as provided in Subsection 109.04.

The Contractor shall provide for two-way traffic through construction operations, except where conditions warrant, as determined by the Engineer, one-way traffic will be allowed. One-way traffic provisions shall apply when fresh bituminous material is being placed, when half-width pavement is being laid, or when necessary due to construction operations. The Contractor shall furnish adequately trained flagmen, warning signs and warning lights, and if necessary, pilot cars for the safe control of traffic. During suspension of work, two-way traffic operations shall be provided. All traffic control devices shall be in accordance with MUTCD.

Snow removal will not be required by the Contractor for traffic service. Watering, or bituminous material used for dust

tions, dimensions, and material requirements including tolerances as shown on the plans or in the specifications.

In the event the Engineer finds the materials or the finished product in which the materials are used or the work performed are not in reasonably close conformity with the plans and specifications and has resulted in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor.

In the event the Engineer finds the materials or the finished product in which the materials are used are not within reasonably close conformity with the plans and specifications but that reasonably acceptable work has been produced, he will document the basis of acceptance by contract modification which will provide for an appropriate adjustment in the contract price for such work or materials.

Within one day of notification of noncompliance, the Contractor shall give the Engineer written notification of his intended course of action. Options open to the Contractor include: (1) removal and replacement; (2) correction; and (3) requesting acceptance of the material at an adjusted price.

105.04 Coordination of Plans, Specifications, the Supplemental Specifications, and the Special Provisions: The specifications, the supplemental specifications, the plans, special provisions, and all supplementary documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work. In case of discrepancy, calculated dimensions will govern over scaled dimensions; plans will govern over standard specifications; supplemental specifications will govern over standard specifications; special provisions will govern over standard specifications, supplemental specifications and plans.

The Contractor shall take no advantage of any apparent error or omission in the plans or specifications. In the event the Contractor discovers such an error or omission, he shall immediately notify the Engineer. The Engineer will then make such corrections and interpretations as may be deemed

necessary for fulfilling the intent of the plans and specifications.

105.05 Cooperation by Contractor: The Contractor shall give the work the constant attention necessary to facilitate the progress thereof, and shall cooperate with the Engineer, his inspectors, and other contractors in every way possible.

The Contractor shall in writing designate and shall have on the work at all times, as his agent, a competent Superintendent capable of reading and thoroughly understanding the plans and specifications and thoroughly experienced in the type of work being performed, who shall receive instructions from the Engineer or his authorized representatives. The Superintendent shall have full authority to execute the orders or directions of the Engineer without delay and to promptly supply such materials, equipment, tools, labor and incidentals as may be required. Such superintendence shall be furnished irrespective of the amount of work sublet. He shall keep the Engineer informed as to his work schedule including prior notice before starting each phase of the contract.

105.06 Cooperation with Utilities: The Department will notify all owners of utilities of the proposed construction and conflicts requiring adjustment and endeavor to have all necessary adjustments of the utilities and other appurtenances within or adjacent to the limits of construction, made as soon as practicable.

All utilities and all other utility appurtenances within the limits of the proposed construction which are to be relocated or adjusted, are to be moved by the owners at no expense to the Contractor, except as otherwise provided for in the special provisions or as noted on the plans.

It is understood and agreed that the Contractor has considered in his bid all of the permanent and temporary utility appurtenances in their present or relocated positions as shown on the plans and that no additional compensation will be allowed for any delays, inconvenience, or damage sustained by him due to any interference from the said utility appurtenances or the operation of moving them.

In general, the contract will indicate various utility items,

Proposal and implementing the change.

- (3) The accrued net savings for all accepted cost reduction proposals, for each contract, shall be shared as follows:
- (a) For the first \$10,000 increment of accrued net savings, the Contractor will receive 100 percent and the Department 0 percent.
 - (b) For the next \$40,000 increment of accrued net savings, the Contractor will receive 75 percent and the Department 25 percent.
 - (c) For all accrued net savings over \$50,000, the Contractor will receive 50 percent and the Department 50 percent.
- (4) Contract prices shall be adjusted by subtracting the Department's share of the accrued net savings.
- (5) The adjusted contract prices shall constitute full compensation to the Contractor for the value engineering proposal and the performance of the work thereof.
- (E) Upon acceptance of a value engineering proposal, any restrictions imposed by the Contractor on its use or on disclosure of the information shall become void, and the Department thereafter shall have the right to use all or any part of the proposal without obligation or compensation of any kind to the Contractor.

105.04 Coordination of Plans, Specifications, the Supplemental Specifications, and the Special Provisions: The first paragraph of this subsection shall be deleted and the following substituted therefor:

The specifications, the addendums to the standard specifications, the supplemental specifications, the plans, special provisions, and all supplementary documents are essential parts of the contract, and a requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work. In case of discrepancy, calculated dimensions will govern over scaled dimensions; plans will govern over standard specifications; addendums to the standard specifications will govern over standard specifications; supplemental specifications will govern over standard specifications and addendums to the standard specifications; special provisions will govern over standard specifications, addendums to the standard specifications, supplemental specifications and plans.

105.08 Construction Stakes, Lines and Grades: Add the following paragraph immediately following the second paragraph of this subsection:

Grade stakes shall be placed by the Engineer on all courses up to and including the untreated base course. Except that the Engineer may elect not to place grade stakes on a given course, if the course immediately above is composed of the same material from the same source and at the same unit cost.

Section 105.04, First Paragraph as Amended by Addendum No. 2 To Standard Specifications dated Feb. 1, 1985

All cost of maintenance work during construction and before the work is finally accepted will not be paid for separately, but the cost shall be included in the unit prices bid for the various pay items.

105.15 Failure to Maintain Roadway or Structure: If the Contractor, at any time, fails to comply with the provisions of Subsection 105.14, the Engineer will immediately notify the Contractor of such noncompliance. If the Contractor fails to remedy unsatisfactory maintenance within 24 hours after receipt of such notice, the Engineer may immediately proceed to maintain the project and the entire cost of this maintenance will be deducted from the monies due the Contractor on his contract.

105.16 Acceptance: (a) Partial Acceptance: If at any time during the prosecution of the project, the Contractor satisfactorily completes a unit or portion of the project, and such unit or portion is deemed necessary for the convenience of traffic, such as a structure, an interchange, or a section of road, he may request the Engineer to make final inspection of that unit. If the Engineer finds upon inspection that the unit has been satisfactorily completed in compliance with the contract, he may make written acceptance of that unit as being completed and the Contractor may be relieved of further responsibility for that unit. Such partial acceptance shall in no way void or alter any of the terms of the contract.

(b) Final Acceptance: Upon due notice from the Contractor of presumptive completion of the entire project, the Engineer will make an inspection. If all construction provided for and contemplated by the contract is found completed to his satisfaction, that inspection shall constitute the final inspection and the Engineer will make the final acceptance and notify the Contractor in writing of this acceptance as of the date of the final inspection.

If, however, the inspection discloses any work, in whole or in part, as being unsatisfactory, the Engineer will give the Contractor the necessary instruction for correction of same, and the Contractor shall immediately comply with and execute such instructions. Upon correction of the work, another inspection will be made which shall constitute the final inspection provided the work has been satisfactorily completed. In such event, the Engineer will make the final acceptance

and notify the Contractor in writing of this acceptance as of the date of final inspection.

105.17 Claims for Adjustment and Disputes: If, in any case, where the Contractor deems that additional compensation is due him for work or material not clearly covered in the contract or not ordered by the Engineer as extra work as defined herein, the Contractor shall notify the Engineer in writing of this intention to make claim for such additional compensation before he begins the work on which he bases the claim. If such notification is not given and the Engineer is not afforded proper facilities by the Contractor for keeping strict account of actual cost as required, then the Contractor hereby agrees to waive any claim for such additional compensation.

Such notice by the Contractor, and the fact that the Engineer has kept account of the cost as aforesaid, shall not in any way be construed as proving or substantiating the validity of the claim. If the claim after consideration by the Engineer is found to be just, it shall be paid as extra work as provided herein for force account work. Nothing in this subsection shall be construed as establishing any claim contrary to the terms of Subsection 104.02.

SECTION 106—CONTROL OF MATERIAL

106.01 Source of Supply and Quality Requirements: The materials used on the work shall meet all quality requirements of the contract. In order to expedite the inspection and testing of materials, the Contractor shall notify the Engineer of his proposed sources of materials prior to delivery. At the option of the engineer, materials may be approved at the source of supply before delivery is started. If it is found after trial that sources of supply for previously approved materials do not produce specified products, the Contractor shall furnish materials from other sources.

106.02 Local Material Sources: (a) Proposed Sources: Possible sources of local materials may be designated on the plans and described in the special provisions. The quality of materials in such deposits will be acceptable in general, but the Contractor shall determine for himself the amount of equipment and work required to produce a material meeting

schedule, the Engineer may require the Contractor to delay unscheduled activities until the Engineer is able to accommodate the changed work.

108.06 Determination of Contract Time: Delete this subsection in its entirety and substituted the following therefor:

The number of days allowed for completion of the work included in the contract will be stated in the proposal and contract, and will be known as the "Contract Time."

When the contract time is on a working day basis, the Engineer will furnish the Contractor a monthly statement showing the number of days charged to the contract for the preceding month and the number of days specified for completion of the contract. The Contractor will be allowed two weeks in which to file a written protest setting forth in what respect said monthly statement is incorrect, otherwise the statement shall be deemed to have been accepted by the Contractor as correct. Saturdays, Sundays, legal holidays and periods of suspension of work on all items as ordered by the Engineer shall be excluded from the computation. No working days will be charged during the months of December, January and February.

When the contract time is on a calendar day basis it shall consist of the number of calendar days stated in the contract counting from the effective date as defined in Subsection 108.01, including all Saturdays, Sundays, holidays and non-work days. All calendar days elapsing between the effective dates of any orders of the Engineer to suspend work and to resume work for suspensions not the fault of the Contractor shall be excluded.

When the contract completion time is a fixed calendar date, it shall be the date on which all work on the project shall be completed.

No exclusion of contract time will be made if the work is suspended for non-compliance.

Suspension of work on some, but not all items, as ordered by the Engineer, shall be considered partial suspension. Partial suspension may apply to working day or calendar day contracts. In case of partial suspension, not due to any fault of the Contractor, the amount of time charged for each day under partial suspension shall be as determined by the Engineer, as the greater of:

- (1) 0.15 day
- (2) the quotient (rounded to hundredths) obtained by dividing the sum of the bid amount for the specific items of work that are performed by the total value of original contract amount.

When final acceptance has been duly made by the Engineer as prescribed in Subsection 105.16, the daily time charge will cease.

108.07 Determination and Extension of the Contract Completion Date: Delete this subsection in its entirety and substitute the following therefor:

The number of days for performance allowed in the contract as awarded is based on the original quantities as defined in Subsection 102.04. If satisfactory fulfillment of the contract requires performance of work in greater quantities than those set forth in the proposal, the contract time allowed for performance shall be increased on a basis commensurate with the amount and difficulty of the added work. Requests for additional "Contract

Section 108.06 as Amended by Addendum No. 2 To Standard Specifications dated Feb. 1, 1985

Time" due to extra work shall be submitted by the Contractor, and is agreed upon by the Engineer, made a part of the "Work Order" or "Supplemental Agreement" covering the proposed extra work at the time it is submitted for approval.

Requests for additional "Contract Time" due to delays shall be submitted to the Engineer in writing by the Contractor within thirty days after the time of the occurrence of the delay. Such requests shall set forth the reasons he believes will justify the granting of his request. The Engineer will consider such requests and, if justified, will issue a "Supplemental Agreement" for approval. Failure to make such requests within the above limits will be considered as a waiver on the part of the Contractor as to the need for additional contract time.

Additional time due to increased quantities for items set forth in the contract will be allowed by the Engineer for Construction at the time final quantities are determined, based on the following summary:

"Contract time specified in the proposal shall be allowed to increase in proportion to the total value of work performed to the value of the original contract amount. Extra work covered by Work Order or Supplemental Agreement on which additional time has been allowed shall be excluded from the computation. Additional time indicated on an approved Work Order or Supplemental Agreement shall be added to the contract time."

Additional time to be added to calendar day and completion date contracts shall be added in calendar days. Additional time to be added to working day contracts shall be added in working days.

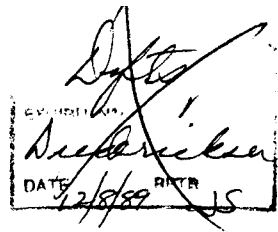
If the Contractor finds it impossible for reasons beyond his control to complete the work within the contract time as specified or as extended in accordance with the provisions of this subsection, he may, at any time prior to the expiration of the contract time as extended, make a written request to the Engineer for an extension of time setting forth therein the reasons which he believes will justify the granting of his request. The Contractor's plea that insufficient time was specified is not a valid reason for extension of time. If the Engineer finds that the work was delayed because of conditions beyond the control and without the fault of the Contractor, he may extend the time for completion in such amount as the conditions justify. The extended time for completion shall then be in full force and effect the same as though it were the original time for completion.

108.08 Failure to Complete on Time: Delete the table of liquidated damages and substitute the following therefor:

ORIGINAL CONTRACT AMOUNT		DAILY CHARGE	
From More Than	To And Including	Calendar Day Or Fixed Date	Work Day
\$ 0	\$ 25,000	\$ 45	\$ 63
25,000	50,000	75	105
50,000	100,000	110	154
100,000	500,000	150	210
500,000	1,000,000	225	315
1,000,000	2,000,000	300	420
2,000,000	5,000,000	450	630
5,000,000	10,000,000	600	840
10,000,000		700	980

Ex. 8-p

SITE INVESTIGATION & REPORT



BP

PROCON CORPORATION

1. Name of Project Clay Hills Pass, San Juan County
Owner UtDOT
Location San Juan County Near Halls Crossing
Date of Bid 2/04/86 @ 2:45 PM
Project description 175,400 C.Y. of Roadway Excavation
2,080 Tons of Bitreated Base Course + 1450 Tons of
Roadmix Bituminous Surface Course
Scheduled working days 90 Bonded: Yes ☒ No ☐
Bid Bond Required? Yes ☒ No ☐ % 5
Contracting agency UtDOT
Advertised ☒ Negotiated ☐
Funded Federal agency
Wage requirement yes Davis Bacon, Area II
DBE requirement 10 % WBE requirement 5 %
Retention held yes % 10 - 50% Complete
2. Date of Visit January 29th 1986
3. Distance to closest towns or cities Blanding, Utah
4. Highways:
a. Type and surface condition Asphalt - Paved
b. Capacities of bridges or load restrictions N/A Transport
Truck Through Hartselle are across Fly Canyon Bridges
or Cross Bull Frog - Halls Crossing, Freely
5. Nearest commercial airport Blanding - Det Stop @ Halls
at Bull Frog

6. Barge lines and river conditions:

- a. Barge traffic & capacity Ferry located at Bull
Frog & Halls Crossing Check to see Capacities
- b. Barge season year around

7. Haul roads, distance and conditions:

- a. From barge dock facility Halls Crossing Approx 22 mile Paved
- b. From material sources Blanding or Bluff - Halls
via paved incline grade (winding) approx
45-60 miles

8. Power connections:

- a. Closest installation and capacity description Halls
Crossing 22 mile
- b. Cost of extension or installation on job N/A

9. Telephone communications:

- a. Name and address of supplier N/A
- b. Cost of extension or installation on job N/A Halls
Crossing nearest Phone - Marine Radio's usage

10. Land rental, ownership and availability if Owner does not supply adequate working area:

- a. At project West end of project North Side
of road - good area - no cost
- b. Off site Storage available at Halls Crossing
rent unknown

11. Determine extreme weather and length of working season Approx
6,500' msl. 100° Summer, 70° Spring & Fall - 30-50 Winter
a. Question for any unusual working conditions Absc is replacing
Slide - What Conditions Caused Slide & do they still exist, what
effect will that have on material handling

12. Personnel and labor requirements:

a. Unions and/or hiring hall locations Non-Union
Blanding - Native American employment Center
b. Federal Davis Bacon Wages yes
c. What area rates Area 2

d. Secure copies of current pay schedules ✓ (check when complete).

e. Supply of common and skilled labor in area Good Supply
of Labor - Peabody Coal Company located in 4-Corners
Native American Operatives Available

f. Predominant industry: agriculture, timber, mfg, mining,
etc. Ranching - Some mfg and Coal Mining

13. Housing: Availability; adequacy, location with reference to
job site Truckers available for rent at Halls

Crossing approx 22 miles from Project good facilities
Blanding - Hotels approx 40 miles from Project
Ray Canyon - No Telephone

14. Trailer facilities: location; adequacy; availability

See Above

15. Local subcontractors or suppliers:

a. Equipment rentals ~~Crawley Const~~ - ^{Monticello} ~~Monticello~~
Southern Paving - Moab; Ralph Dunn - Blanding
Jerry Holliday - Blanding

b. Equipment repair/parts services Grand Junction
Crawley Equip - Lake Shore - Phoenix;

c. Aggregate Jerry Holliday Blanding & Bluff
Southern Paving - Moab

d. Rock and riprap materials N/A

e. Clearing Same as Above

f. Painting N/A

g. Mechanical N/A

h. Electrical N/A

i. Ready-mix plants N/A

k. Rental haul trucks Ralph Dunn - Blanding
+ Jerry Holliday - Blanding

l. Seeding and sodding N/A

m. Bituminous surfacing and roadwork Southern Paving
North Mountain General Contractor

n. Speciality groups; pipe installation, drillers, blasting,
flagging and safety; Structural: No

o. Others: DBE (WBE) Southern Paving

16. Secure copy of local telephone directory ☒ (Check when complete).

17. Visit owner's and/or owners representative:

a. Project office location U.D.O. & office located
in Bladensburg Phone _____

b. List names and titles of persons contacted

Name Hugh Riekman Date 1/29/86

Title Project Engineer Phone N/A

Name _____ Date ____/____/____

Title _____ Phone _____

Name _____ Date ____/____/____

Title _____ Phone _____

Name _____ Date ____/____/____

Title _____ Phone _____

Name _____ Date ____/____/____

Title _____ Phone _____

c. Discuss general job requirements ☒ (Check when completed).

Notes excavating slide and fill material from mountainous area surrounding saddle or roadway from slide area. Place fill in 200' deep gouge next to existing embankment. No rock should be encountered. Clay material hard but breakable with medium effort. Possible extra work involved in stabilizing slide if fence goes below subgrade. Access biggest problem - Water source close.

d. Clarify questioned items in specifications ☒ (Check when complete).

Questions:

1. Plans & Profiles very unclear & confusing. Clarify as to cut & fill, placement & location of items.
2. Water sources & cost. Distance from project.
3. Rock excavation & blasting - How much if any, what location (note station location on plan).
4. What caused slide, ground stable, any special requirements for handling materials.
5. Indian Ruins & Problems. Any soils reports or similar studies done on project excavation.

Responses:

1. MR. Kiekham, P.E. pointed out cut area being showing centerline & states cut slope 1:1 to top. Approx 200' fill gouge 200' deep. Plans ~~show~~ ^{show} distance to area.
2. Water sources pointed out - Tracking some trail work for water with Pouches (improving Mormon trail).

3. No Rock or Solid materials should be encountered other than Clay (boulders) 1-3' dia. No shooting required as indicated by Mo. Firearm.
4. Water Seepage cause foundation material to slide. Seepage may continue below subgrade extra work may be required.
5. Very high concentration of Indian Ruins - Feds very active - Crews instructed not to disturb if found.
No soils reports available, no seismic studies done by State.
 (Use additional paper if needed)

- e. Discuss specifics: Safety requirements, Labor (Minority) requirements, construction easements, landmarks, antiquity requirements, as needed ☒ (Check when complete. Notes Water Seepage area with Native American unemployment high - 10% Minority required
Sub) High Concentration Indian Ruins + Working Make
Employees aware of - do not disturb, Moenon Historical Site near project do not disturb.

- f. Examine special reports: Soils reports, survey reports, profiles, engineering cross-sections, ground water reports, etc. Secure copy if possible; otherwise make extracts of pertinent features ☐ (Check when completed).

Comments: No Soils reports made by U.D.C. Project
Engineer stated no solid materials mostly clays
maximum size approx 3-feet ^{all in expansion} material moving
caused by water seepage. Indicated possible extra
work required to stabilize materials below subgrade
swell factor shown on plans as 5% to 5% shrink
which indicates no solid materials

- g. Secure pictures from owner as available ☒ (Check when complete). N/A
- h. Request conducted tour of proposed work ☒ (Check when Complete). Date of Tour 1/29/86

- i. Examine all cores and logs of test holes available. (Check when complete).

Comments: No Test holes made - dense Rod 2 feet into test area - 30 ft - Project Engineer explained no solid materials should be encountered - All Rippable with medium effort - Previous Contractor Original Required no blasting - Flakes contained in fill 3' max. (Use extra sheets if necessary)

j. General discussion of geology.

Notes: Materials Clay medium to hard - no blasting needed - Rippable Some boulders Flakes - Project Engineer indicated previous Contractor Required no blasting - Slice cut approx 200' above existing highway U.D.C. will not pay for over cut - Some eroded gulches on fill side need to be closed level Access Rd Required to bring fill to base of placement - Steep 5% swell shown on Plans, no seismic studies, but only 5% swell shows no blasting anticipated. Excavation Volumes: Waste area designated on So. Side not included in dump fill.

A) Common: 125,400 BCY; 5% Swell Factor 5% noted on Plans
B) Rock: None BCY; 5% Swell Factor 5% in some areas.

Common Materials description: Clay materials breakable by hand Some Boulders 1-3' material must - Slide area still moving P.E. indicates possible water work may be Required to stabilize blow subgrade Moisture 8-11% Rock Description 3' maximum Flakes may be found in excavation - Areas indicated on Plans as solid are not according.

Project Engineer - Hugh Kiekhafer 1-27-86
No Soils Test or log Drill Holes Done, No Seismic Studies Available - State plans indicate 5% swell in solid materials which is indication of none blasting or heavy ripping needed. Water Content may be high 80-85% Water Seeping @ Present.

Loadability of soils. Plan notes indicate a 8% swell factor = 95% loadability plus some area shrink of 5% indicating a 105% factor probably because of moisture.

Traffic, congestion, obstacles. Lake Powell Traffic heavy beginning Memorial Day - Possibly on Easter Sunday - median - Work area should not affect traffic.

Grades. Steep - on way access road requires some delay factor for cost of access & grade 40%
Drainage. Poor, but should not be factor.

Underfooting. Possibly unstable if loose - Spring weather may cause problem.

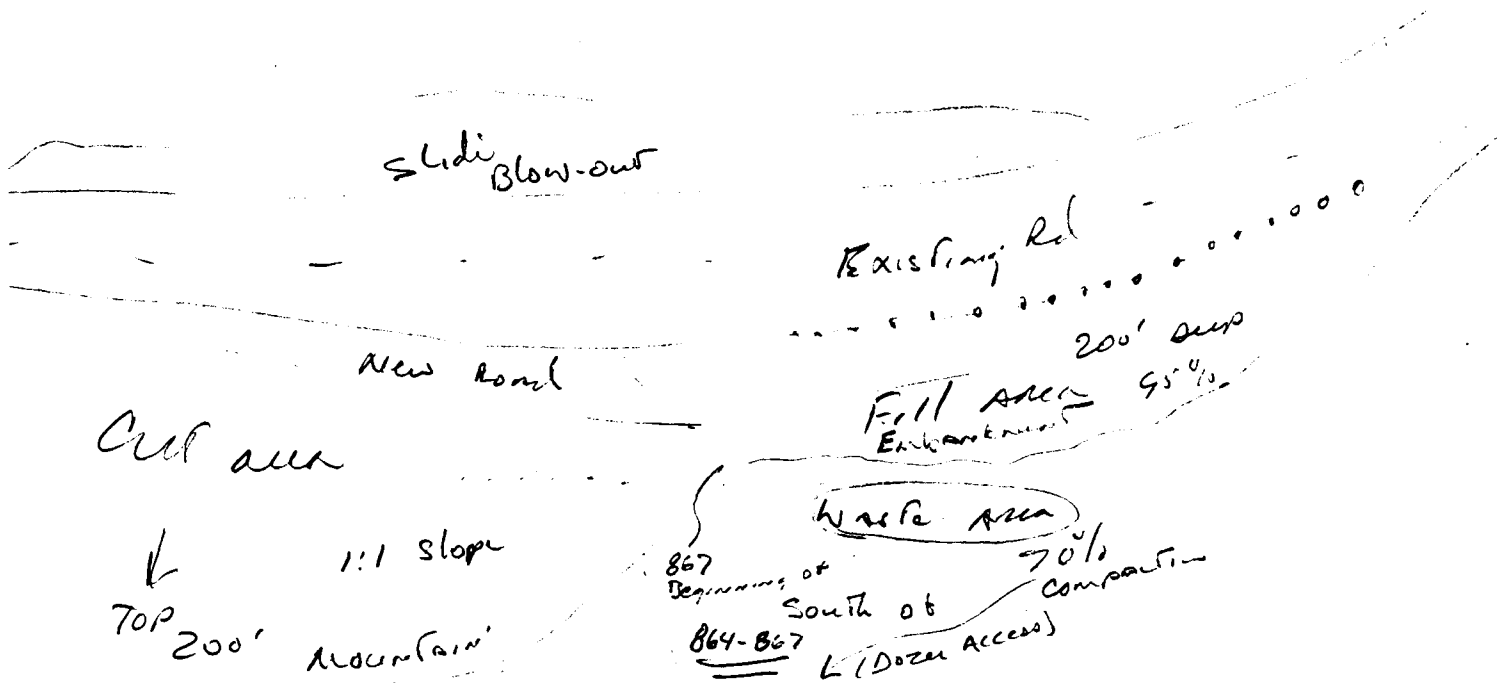
Compaction Lifts. 1-2 feet. 6 to 95% in Subgrade - 90% waste

→ % of compaction shrink in fill Approx 10-15% No Soils Reports available See Table for clay to 95%

19. Describe site: Take photographs of all borrow areas; fill areas; general construction areas; extent of clearing and grubbing required; include map of location in relation to state highways; and staging areas

Notes. Existing highway running approx East & West. West end of construction area from beginning approx 855+00. South Side contains large existing cut of Moenkopi - Materials shifting to road. High degree of erosion. Cut area beginning at Silver Cut approx 200' above exist Rd. Mainline approx 1:1 slope. Plans very vague and confusing. Access Rd must be built to bottom of fill using material on east end of cut - (Doser). Access Rd must be built for access to top of Silver Cut - the backhoe (no pay for Over Cut). Fill area steep & 200' deep (See photos). Access problem delay on cycle times - Steep grade may need push-pull scrapers or DFB's to handle grades. Top load scrapers with b.h. Waste area waste so at daylight could be handled by Dosing.

SKETCH OF JOB



19. Determine availability of water both potable and construction!

Notes: Project Engineers indicated source of water 1 area 3 miles from job site. Another approx 6 miles. P.E. indicated may not need much water material contained between 8-11% Moisture - Previous contractor needed ^{very little} Haul Distance 3-6 miles

20. Work camp (if required):

- a. Recommend location Hand Halls Crossing
- b. Nearest utilities Same
- c. Distance from worksite 22 miles

21. Recommend location of contractor's staging area:

- a. Locate office, shops and sheds North side of road west end of project

b. Estimate work required to prepare site Approx 2 wks

c. Locate plant and aggregate area N/A

1. Estimate site preparation requirements N/A

2. Determine foundations conditions Clay substrate
may contain 8-11% moisture as is IF low
grade would cause hazard and slippery conditions

d. locate storage areas for materials Same as slagging
area

e. Recommended temporary roads N/A

f. Is local road surfacing material pit available? Yes ☒
No ☐ Explain:

Road surf material available in Bluff, Blanding
Jerry Holiday - Mosb - Southern Paving

22. Investigate ground-water conditions, natural drainage areas and features which may be revised or relocated to assist in maintaining dewatered operations'

Comments No dewater problem, but materials caused slide may not be stable - P.E. indicates possible erosion work required to stabilize below sub-grade

23. Determine Insealment locations'

Description None

Station' _____ Description _____

Station' _____ Description _____

_____ Station _____

Description _____

Station _____ Description _____

_____ Station _____

Description _____

Station _____ Description _____

_____ Station _____

(Use additional paper if required)

24. Determine if terrain and working conditions will allow or require specialized equipment Steep grade in full section

will require double ~~boom~~ scapers or 4x6 DFB

Trucks - Access will require b.H. to load to chump pt. (Except Designated Waste Area should be over accessible)

25. Storing requirements Only if required to go below Subgrade by Engineer @ Extra.

26. Production: H.E. Recommendations

- a) Type of equipment 2 dozers, 6 H. (2cy-3cy) Scrapers or Trucks, Compactor
- b) Haul unit size D7B - 0-400 40 tons (30cy) or 632 or TS 24 Twins (30cy)
- c) Excavator or Loading unit 2-3 cy 6 H. or 7 1/2 cy Loader
Min. Loader (5 cy) 980 size Access need 6 H. @ beginning
- d) Haul distance MAX - 1,000 ft to 1,200 ft Min 500 - Waste Area
- e) Accessibility (Load & Haul) Poor - steep grade Combined Access (1-way waste area could be 2-way if require)
- f) Delay factors Very steep grade at beginning, very low accessibility for 6 H. Cutting - Since cut - one way haul faster until grade is up - Estimated 1 month after access rd built to being grade up & cut down to acceptable levels. Down Production should be high, no waste seen
- g) Total delay time:

- 1-Loading/excavation 6 weeks Access Rd + ^{Load to haul units} ~~fill area~~
- 2-Haul and placement 4 weeks to being fill up (1/2 production)
- 3-Obstacles Accessibility in full area & cut area total 6 wks
- 4-Crew Need experienced crew because of conditions
- 5-Weather Should not be factor

h) Depth of Cut/set 6-8 ft per set

i) Swing angle 180° max - 90° min

j) reach requirements N/A

k) Dump or loading target Scrapers or D7B Trucks

l) Loadability of soil (Swell Factor) 5%

m) Excavation conditions Excellent X Average (-)

Severe Explain Waste area Ayrant to 864-867 area Down Road

Material not Grade - Right conditions - 1/2 production

Factor estimated 25% loss due to access problems for 1/3 of Job [1/2 production cap 0-30%; 2/3 production cap 30-50%; Full production 50%-100% excavation]

Scheduled Hours/Shift 10-----

Work Hours/Shift 10-----

Estimated Bucket Payload Factor 95%-----

Production Hours/Shift 50 minute hours-----

Truck reach DJB D-400 (if required)

Notes:

Larry F. arrange for job Tour with Project Engineer
Staker Paving & Construction requested an excavation
Price on this project and offered to pay for fuel
for flight to project. Jim D decided one last
minute to cancel trip to Denver (Crew Dunn Problem)
and accompanying party to project Tour. Left Woodcross
Approx 11:30 Am in Didericksen & Son's Corona 310 &
with Abdee? from Staker Arrived at Hall's
Crossing Airport @ Approx 1:30 pm. Meet Mr Hugh Kiekham
from U.D.O.T. Traveled in his vehicle to project site
Approx 28-30 miles from Hall's Crossing. Noted several Indian
Ruins along way. Mr. Kiekham indicated Crews should be
aware of them and if found do not disturb. Mr.
Kiekham explained general job description and the
need for work. Roadway foundation had slid
into wash area therefore the U.D.O.T. was moving
road and replacing fill into large deep gouge
~~to~~ ^{per} existing roadway fill placed by others
Approx 10 years previous. Stop at Two (e) water

Notes Continued

Sources and Clockwork mileage. Mr Kirkham indicated The need for water except for Dust Control may be slight. Materials ~~must~~ contain 8-11% moisture in place. Previous Contract required very little water. Arrived at job site. Mr Kirkham explained plans somewhat showing where existing stakes had been placed & pointed out the Historical markers and the need to not disturb. He indicated the wagon trail and the possibility of using some work for ranches for use of water. Walked the full length of project. Mr Kirkham showed north side where side had pushed out. He indicated the possibility of a large amount of extra work which may be required if the ground surface continued below the sub grade. He indicated they would now go out to the bottom of the Section. Larry & Abdee ask about rock. Mr Kirkham pointed a boulder approx 2' diameter and indicated that was all we could expect nothing solid only those flanks. He picked up a small solid and shattered it on the road. He indicated the previous contractor had not blast. When asked about the plans He indicated the planner had never seen the project that is why the plans are difficult to understand. It looked like an ideal job for DFB & b.H. Kirkham pointed out rock with Indian writings at the top of hill. Full area very steep. He returned to Airport approx 4:30 after snacks at Hall's Crossing Marina returned to SCC via stop @ Price for fuel arrived @ 7:00 pm

Person Making inspection and Report

Date of Report 1/30/86

Signed

Larry & Abdee
James D. Erickson

Ex. 18-p

FILE COPY

PROCON CORPORATION
P.O. BOX 177
North Salt Lake, Utah 84054

April 14, 1986

Mr. Hugh Kirkham, P.E.
UTAH DEPARTMENT OF TRANSPORTATION
South Highway 191(#79)
Blanding, Utah 84511

RE: Clay Hills Pass.

Dear Hugh:

As a follow-up to our telephone conversation concerning the large material we have encountered and the location of the designated waste area.

We consider the material encountered between sta. 864 to 867 to be a change in subsurface conditions from that which is indicated on the plans and which was indicated in the pre-bid tour.

As I stated we have been informed by Bill Thomas of a directed change in the location of the designated waste fill area from that which is indicated on Sheet 3 of the bid plans. These changes will us impact us significately; therefore, we will keep track of costs and inform you as to the impact at a later date once they have been determined.

We are looking forward to providing you with the best of our ability and developing a good working relationship with you.

If there are any questions, please feel free to contact me.

Sincerely,

Larry W. Fillmore
Director of Operations

cc: J. Didericksen
File

Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Handwritten signature
EXHIBIT NO. *C-1*
Fillmore

Ex. 34-p

CLAY HILLS PASS
San Juan County
PROCON CORPORATION

Reference: **Project No. ER-052(1)**
 0.428 Miles of Grading,
 Drainage & Bituminous Surfacing

A PRESENTATION OF THE CONTRACTOR'S REQUEST
FOR AN EQUITABLE CONTRACT ADJUSTMENT

PROCON CORPORATION
P.O. Box 624
Centerville, Utah 84014
(801) 292-4308

Mr. James D. Didericksen
Corporate Secretary

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SECTION B

INTRODUCTION

These Volumes are respectfully submitted in support of Procon's request for an equitable contract adjustment of in connection with its work on the Clay Hills Project.

The Procon-UDOT contract was executed on March 11, 1986 in the amount of \$719,000.00. The original project schedule called for 0.428 miles of road construction which included as the principal items of work approximately 175,400 Cubic Yards of Roadway Excavation; 2780 Tons of Untreated Base Course 3/4" or 1" Maxium; and 1450 Tons of Road Mix Bituminous Surface Course 3/4" to be completed within 90 working days. This gave a completion date of approximately July 24, 1986 with a contract start date of March 21, 1986. The contract time was extended by a change of scope condition and directed changes to December 20, 1986. The Bituminous portion of the contract was not completed at that time due to temperature requirements of the specifications. The contract was officially terminated by mutual agreement as of January 1, 1987 due to the liquidation of Procon's Surety company.

Procon encountered, during the performance of the Contract, several problems which were not depicted by the original Contract Documents. Two problems in particular totally changed the scope contemplated in the original bid. Twelve problems each produced not only substantial increases in the time and cost elements of Procon's Contract performance, but changed the entire scope of the original contract. These increases and scope changes, which are compensable within the framework of the Contract, are now the subject of Procon's request for an equitable contract adjustment.

Procon's claim, and the twelve major problem elements of that claim, are analyzed in detail within these volumes. Volume I contains the summary statements of entitlement and quantum, and a detailed narrative which presents both the history and the entitlement of each major problem. This volume also contains the detailed dollar analysis (quantum) of Procon's claim. Volume II and Volume III are a resource document which contains the salient facts of the Contract.

SECTION C

SUMMARY OF ENTITLEMENT

This Document defines eleven separate and specific Problems encountered by Procon Corporation during the performance of its Contract work on Clay Hills Pass Project from March of 1986 through December 1986 in support of Procon's request to the Utah Department of Transportation for an equitable contract adjustment.

The eleven Problems encountered by Procon are fully described in the Problem/Claim Narrative section of this Document. Each Narrative develops in detail the specific issues of Entitlement which supports Procon's claim.

Ten separate theories of Entitlement are developed in the Problem/Claim Narrative and are summarized as follows:

1. Implied Warranties
2. Directed Changes
3. Defective and Deficient Contract Documents
4. Delays
5. Suspension of Work
6. Constructive Acceleration
7. Owner - Furnished Items
8. Maladministration
9. Weather
10. Differing subsurface conditions

The Entitlement Display on the following page summarizes the specific theories of Entitlement which relate to each of the eleven major problems.

ENTITLEMENT DISPLAY

[illegible]

SECTION D

SUMMARY OF QUANTUM

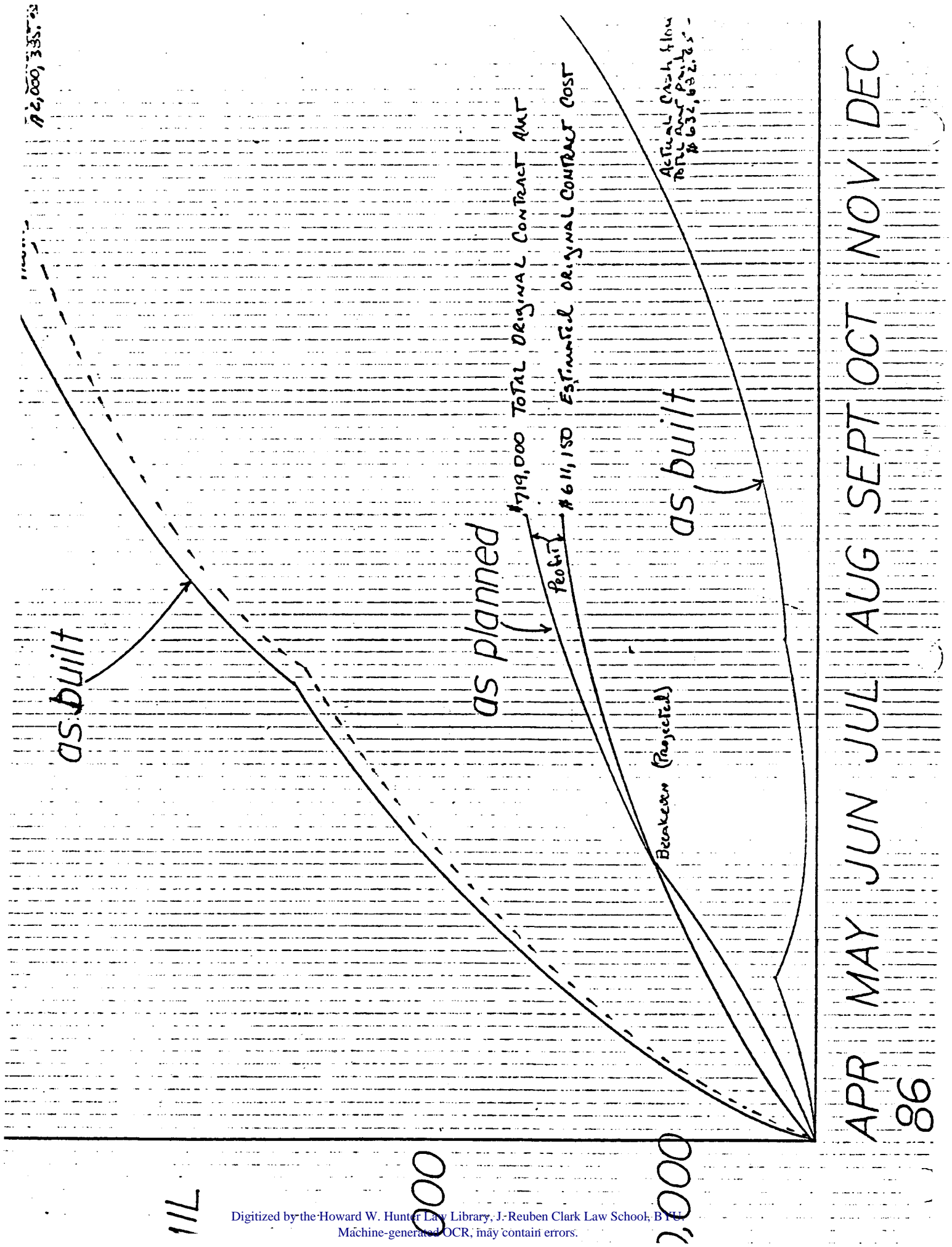
This Document presents and supports Procon's request for an equitable contract adjustment.

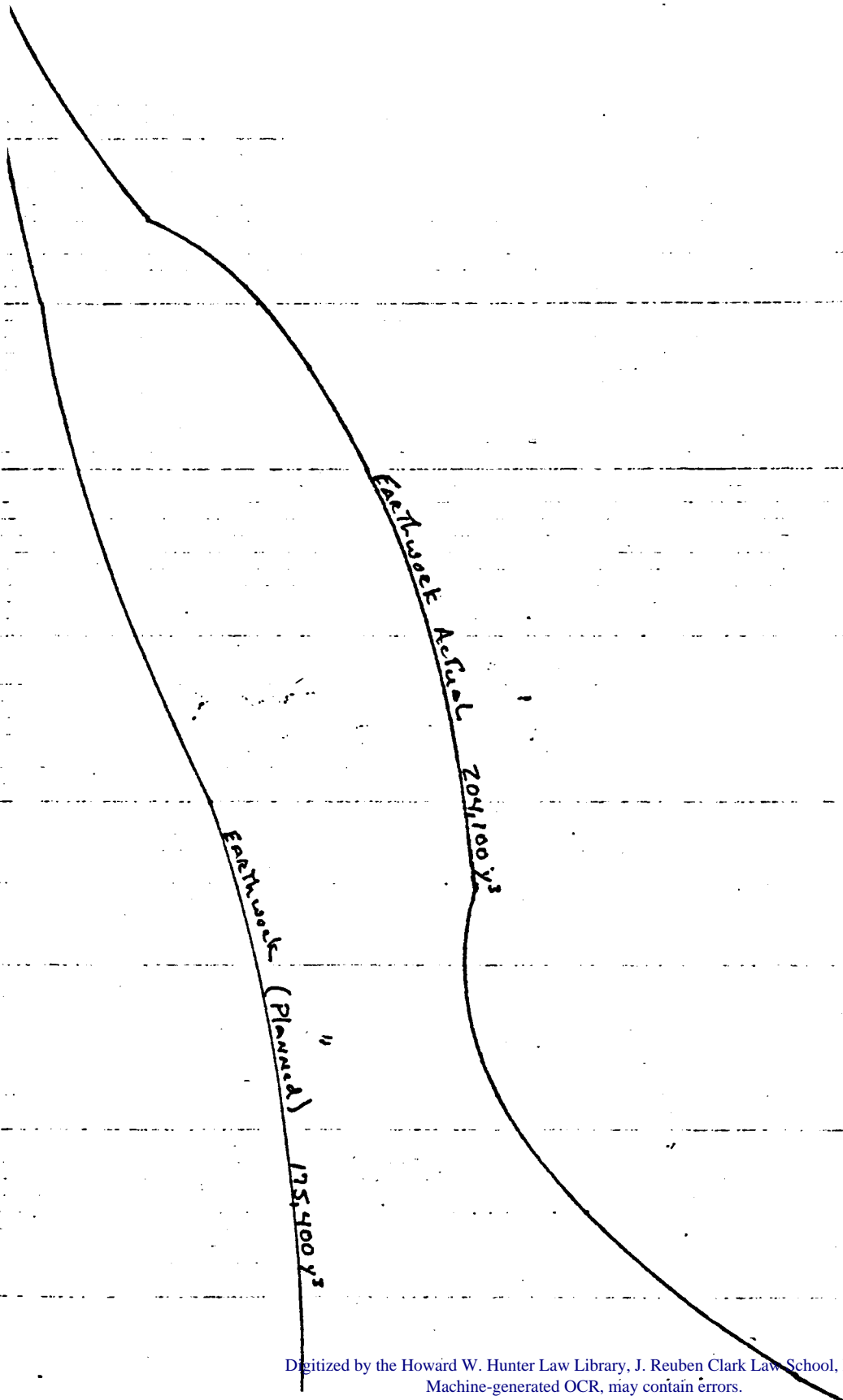
A condensed statement of problem cost is included in each Problem/Claim Narrative Summary in Section F (Volume I). Each Narrative Summary also contains complete detail of the quantum calculations.

The value of each claim:

1.	Directed change of the designated waste area location (Claim I)	\$ 585,143.33
2.	Change of Scope, Differing Sub-surface conditions(Claims II & III)	652,052.08
3.	Constructive Acceleration (Claim IV)	28,491.09
4.	Defective and Deficient Plans (Claim V)	(contributory)
5.	Maladministration (Claim VI)	37,238.41
5.	Owner furnished survey error (Claim VII)	79,647.05
6.	General Damages (Claim VIII)	291,388.81
7.	Lost Profits(Claim IX)	355,822.17
8.	Change in Asphalt Thickness (Claim X)	7,536.37
9.	Directed structural excavation (Claim XI)	1,280.00
10.	Directed change of scope guard rail (Claim XII)	3,784.77

2,042,384.55





GENERAL SUMMARY AND OVERVIEW

1. Project Description

The Utah Department of Transportation issued a bid solicitation proposal called "Clay Hills Pass", designated by project number "ER-052(1)" located in San Juan County approximately 30 miles east of Halls Crossing at Lake Powell. Bids were to be received on 2-04-86.

The scope of the proposed contract was to relocate an existing highway which was damaged by subgrade failure caused by subsurface moisture.

The work proposal called for the roadway excavation of approximately 175,400 cubic yards of material from a designated cut slope to facilitate the highway relocation. The plans indicated approximately 72,947 Cubic Yards from the excavation were to be used as embankment material compacted to 95% in an area immediately adjacent to the cut to further facilitate the planned highway relocation.

The remaining 120,453 Cubic Yards of excavated materials, other than that which was required for access roads and other construction related requirements, were to be placed in a designated waste area immediately to the south of the planned excavation area. The waste material had a compaction requirement of 90%.¹

¹ UDOT, Clay Hills Pass ER-052(1), Bid Document, Plan Sheet 3

Bidding & Estimating Process

As part of the bidding process, it is the policy of Procon Corporation to make a reasonable site investigation. Procon uses an in-house "Site Investigation Report" form patterned after the one published by the Associated General Contractors of America which plays a crucial role in the preparation of the bid and planning the work of successful bidder.²

Site Investigation

Because of the remote location of this project, Procon personnel, Larry Fillmore, made arrangements with UDOT representatives to be taken on a pre-bid site inspection tour on 1-29-86. The tour was conducted by Mr. Hugh Kirkham, who was the designated UDOT project engineer for this job.³

During the tour, Mr. Kirkham reviewed the scope of the project and the various requirements, ie; proposed embankment location, possible water sources, local conditions and available services and location of possible staging areas.

Because of the nature of the project, it was essential for Procon's estimators to be apprised of the conditions of the working material at the site and particularly and unusual conditions.

² Procon Corporation, Site Investigation & Report.

³ Ibid.

Besides relying on the express representations made in the contract documents, several questions of clarification were posed to the Project Engineer during the aforementioned pre-bid site tour.

It was noted, by Procon, that when asked about the nature of the working material, the Project Engineer indicated the materials "had a relatively high moisture content" which "would lessen the need for water for compaction purposes". He further stated that the "high moisture content of the soil was the cause of the subgrade failure which necessitated this project".⁴

During the course of that pre-bid tour, Procon noted that the Project Engineer represented to Procon that "the subgrade was continuing to fail and was still moving", therefore, "there was a high probability that a great amount of additional work was possible." In that, "if the fracture continued below the designed subgrade, UDOT would continue the excavation to an elevation which would extend below the fracture line or point."⁵

Compilation & Strategy Of The Bid

The inherent nature of the earthmoving industry requires the earthmover to have an understanding of the basic materials of earthmoving and their characteristics. There are a number of soil characteristics that affect a soil's behavior for construction purposes which in turn affects their behavior in the

⁴ Procon Corporation, Site Investigation & Report, pg. 8 & 15.

⁵ Ibid.

earthmoving process.

There are two very different schools of concerns involved in an earthmoving project. The designer and engineer are concerned with the ability of the soil to support a structure under the expected load and environmental conditions and the characteristics of the properties of the soils as it relates to the balance between the requirements of the fill and the earth excavation.

The contractor is concerned with such items as the soil's trafficability, loadability, weight, moisture content as well as its drainage and volume change characteristics.

The ability to identify the major soil types which are expected to be encountered and a knowledge of their behavior characteristics is vital to the designer as well as the contractor in the proper choice of equipment and the selection of the method of equipment operation and job prosecution for a particular job.

Trafficability

This is the ability of the soil to support the load of wheeled or tracked vehicles under repeated traffic.

Trafficability is estimated based on the soil type, grade, and moisture conditions expected during construction. It is very important to the construction operations, in that its value determines any special requirements and directly affects the limits of efficient equipment operations for a particular job.

Loadability

This is a subjective measure determined by various soil types where its effects are directly related to the limits of efficient equipment operations by a measurement of the ease with which a soil can be excavated and loaded.

Volume Change Characteristics

By its very nature, earthmoving or excavation is the process of loosening and removing earth from its original position in a specified cut section and transporting it to a designated fill or waste deposit. Because almost all materials change volume in movement from the cut to the fill, ie; excavated earth will expand beyond its original volume in the transporting vehicle which is known in the earthmoving industry as percent (%) swell.

The volume change with placement of soil in the embankment, depending on its original density and the amount of compaction applied, is referred to as percent (%) shrink.⁶ Conversely, to the designer and engineer the above nomenclature has an entirely different connotation. "Shrinkage or swell factor" is defined as the volume occupied in the embankment by the material that volume occupied before it was excavated in comparison to the volume occupied after compacted in the embankment.⁷ In other words the percentage of shrinkage or swell represents the percent volume change between cut and fill.

This is pertinent to the engineer/designer when calculating

⁶ Highway Engineering-Third Ed. pg. 508
by Clarkson H. Oglesby

⁷ Ibid, pg. 512

a balance between cut and fill, but not pertinent contract information, in this format, to the contractor unless the contract calls for pay items based on volume of overhauled materials and/or a bid price per cubic yard measured "in place" and that volume was not given in the contract documents.

The contractor then would be required to know the "shrink or swell" factor of the material in order to calculate how much excavated material would be required to fill the compacted volume of the designed structure as measured "in place".

This particular contract, however, was specified to be paid on a volume measured by "excavated yard" and did not give consideration to any volume measured "in place". The total estimated volume of material required in the embankment was a given, stated quantity.⁸ This contract included a designed embankment and waste area and, as stated, included an estimated quantity required from the cut to fill those items. Therefore, the estimator's concern in evaluating and interpreting the information included in the plans and specification was as it applied in accordance with the standard and customary earthmoving industry practices which was to apply this information as to the "Loadability" impact of this material and its effect upon the efficiency of the planned equipment.

Bid Computation and Compilation

In computing the bid, Procon's estimators considered all the

⁸ UDOT Bid Documents, Clay Hills Pass ER-052(1), Plan Sheet
3

available information as a whole, including specifically the Plans and Specifications, statements made by the Project Engineer, observance of the site conditions during the pre-bid site tour and the total time for completion allowed by the contract. This total information was required in order to give Procon the ability to plan the type, productivity and amount of equipment and labor necessary to meet the production requirements necessary to complete the scope of work within the contract time parameters.

Plans and Specifications

Page three(3) of the plans and specifications state: "There will be a 5% swell in the solid rock at Sta. 855+50+/- Thru 862+00 +/- and a Shrink of 5% in the Material Between Sta. 862+00 +/- Thru 867+00=-."9

Because the pay specifications of the job were to be based upon an "Excavated" pay yard calculated on the basis of a measured bank cubic yard, Procon's estimators interpreted this information in accordance with the industry standards given the job specifications. This interpretation of the information was applied as the relationships between bank measure and loose measure(one cubic yard of material which has been disturbed and has swelled as a result of loading¹⁰), or the loadability and the resulting impact upon the efficiency factors of the planned

⁹ UDOT Bid Documents, Clay Hills Pass ER-052(1), Plan Sheet 3.

¹⁰ Caterpillar Performance Handbook, 17th Ed., Pg. 710

equipment which in turn is the major factor impacting the estimated production rates.

This can either be done by estimating from available physical evidence and/or obtained from job plans and specifications along with any parol evidence given which may indicate the soil characteristics which in turn impacts the soil conversion factors from the bank measure.

In most cases, as it was in this case, it is all three; but for the purpose of the immediate topic, we will focus on the information provided in the Job Plans and Specifications to see its effect on the whole.

Loadability of the Soil

Using soil conversion charts issued by the Earthmoving Industry as customary and Industry standards in determining and estimating the soil characteristics given certain information and in accordance to available industry guidelines, it was noted that a "Solid Rock" connotation, as stated on the job plans, could mean loose rock, weather rock or cemented rock. All of which are economically rippable by dozer. Rock requiring drilling and blasting is nearly always described as "ledge rock or bed rock".¹¹ Added weight was given to this interpretation because of the specific representations made by Mr. Kirkham together with the available physical evidence during the site investigation.

¹¹ Highway Engineering, Third Ed. pg. 504, by Clarkston H. Oglesby.

It was also noted that blasted ledge rock will expand so that 1 cubic yard of rock in the cut section will occupy 1.15 to 1.50 cubic yards in a compacted embankment.¹² As noted the job plans indicate a swell of only 5% or 1.05 cubic yards. Cross checking with other available industry charts, it was noted that materials with a swell factor of 5% only has 4.8% voids compared to blasted rock which would have a range of 16.7 % to 37.5%.¹³ What the Industry soils charts were indicating, given the available information, was an indication that the soil had a consistency of a coarse-grained and sandy soil mixture with very few voids or large size boulders. This type of material would give an indication of a dense material with very little expansion tendencies when excavated. This also coincided with the specific representations made by the Project Engineer and the observed site conditions.

A further indication of the consistency of this particular material was the chart indication that materials with a stated 5% swell factor have a load factor of 95%.¹⁴ This factor would also give an indication of encountering very little rock or boulders during excavation, let alone any material which would require any type of blasting.

¹² Ibid. pg 508

¹³ Caterpillar Performance Handbook, 17th Ed., pg. 809

¹⁴ Ibid.

In accordance with the available industry soils charts, this material is a course, dense material with a small percentage of voids which would be caused by its excavation. It would have the consistency of a course-grained, sandy material which could be compacted with relative ease and is not consistent with materials requiring blasting nor consisting of a large quantity of large boulders.

This information again coincides with what was represented by the Project Engineer, and with what was readily apparent on the surface.

Blasted material has a load factor range from 40% to 75%¹⁵. It also has a compaction swell of 15 to 50% in the embankment, not 5%.¹⁶ The percentage of voids on blasted material is in the range of 16.7% to 37.5% depending upon how well the material fractured during blasting. In accordance with this information, it is certainly out of the range of 4.8% voids as was shown on the charts in which the specified materials fell.

Soil containing a large quantity of large boulders would have even a higher percentage of voids and swell than would well blasted material; therefore, the estimator could not anticipate encountering a large quantity of large boulders in view of the stated information.

¹⁵ Managing Construction Equipment,
by S.W. Nunnally, pg 20; Caterpillar
Performance Handbook, 17th Ed., pg 157

¹⁶ Ibid, page 5; Highway Engineering-Third Ed.
Clarkson H. Oglesby, pg. 508

As a further check upon the loadability factors of this soil, the estimator again referred to the industry soil charts. It was noted that material with the noted consistency has a bank yard weight of approximately 2,800 to 3,100 lbs/yard with the load factor of 86%.¹⁷

Physical field soil test

During the site investigation, a field indentation test was done on surface materials available to Procon. A small sample of soil was mixed with moisture to give a putty-like consistency and formed into a small pat and allowed to dry. The material had a gritty texture and pats were brittle and broke easily. While shaking and jolting the sample in the palm, moisture appeared on the surface of the pat. Subsequent squeezing of the material between the fingers caused the moisture to disappear.¹⁸

This test indicated a material that was consistent with the characteristics of a coarse material containing silts or rock flour, which fall under the Unified Classification of soils as a subdivision of sand and/or gravel.¹⁹ This fact is consistent with the physical appearance and feel of a material that had a coarse sandy texture which even contained some 1/8"(-) gravelly substance which fractured with some pressure between the fingers.

¹⁷ Caterpillar Performance Handbook, 17th Ed., pg. 810; Managing Construction Equip. pg. 4

¹⁸ Procon Corporation, Site Investigation & Report.

¹⁹ Civil Engineering Handbook, pg. 460

The material also appeared to contain a small amount of clayly type silts which offered some binding factor.²⁰

Time for completion

"Time is money" is an accepted truism in the earthmoving industry. It is a major constraint and has a profound contributing impact on the earthmoving estimator during his activity planning, optimum resource utilization, and economical production objectives within the project parameters. It has an enormous impact on the estimating/management decision trade offs in reviewing performance requirements in order to meet the project time constraints such as number of shifts per day, number of working days per week, use of overtime, the effects of holidays and expected weather conditions.

It also gives the estimator a window into the mind of the designer as to the designer's view of the scope of work, any inherent difficulties anticipated and his estimated performance capabilities to realistically accomplish the defined scope of work within the scheduled time.

This project contained a time of completion of 90 working days.²¹ Using this stipulated time constraint as a guideline, the estimator made the reasonable assumption that it was obvious the designers did not forecast or anticipate any significant drilling and blasting requirements on the project. Any such

²⁰ Procon Corporation, Site Investigation & Report; Managing Construction Equipment, pg 12

²¹ UDOT Bid Documents, Clay Hills Pass ER-052(1)

requirements would have greatly impacted the realistic, minimum time frame in which the work could be accomplished. A realistic time frame for any significant drilling and blasting forecast, in view of the physical constraints existing in the scope of the project, would have been from 1/3 to 2/3 of the allowable 90 days set out in the contract. This would have left an unreasonable and virtually impossible amount of time to accomplish the remaining activities required in the scope of the contract.

Physical Constraints

The physical characteristics of the soil have already been discussed previously; therefore, this portion of the discussion will be limited to physical job conditions and constraints of the site.

The actual physical job conditions are the controlling factors involved in project work methodology which in turn impact the estimated productivity, job efficiency, work schedule and the need for specialized equipment.

This particular project had some unique physical considerations. The embankment material was to be placed in a large depression of approximately 200 vertical feet below the existing road grade. The negative grade was all within +/- 500 L.F. of the cut. The top of the cut section was approximately 200 vertical feet above the existing road grade with an approximate total length of +/- 500 L.F. Therefore the total project was a little over 1,000 L.F. long making the work accessibility very limited.

As previously stated, only 72,947 cubic yards of the total 175,400 cubic yards or 42%²² of the total was specified as being required to be placed in the embankment. The remaining 58% was to be placed in a waste area immediately to the right of the cut and would not be subject to the steep negative grade. The plans did not include any profiles of the designated waste area, nor any topographical drawings.²³

Procon based it's construction methodology, productivity and equipment requirements around the criteria noted on the plans and information obtained during the site investigation.

Application of the information

When bidding a project, a contractor must estimate how much the project will cost while it still exists only on paper. To this cost is added what seems to be a reasonable profit and overhead. This constitutes the contractor's quoted price for the project. It is often said that competitive bidding for construction work is the biggest gamble of the business world. It is a critical assembly process of the total combination of all the information available.

Bidding is a difficult undertaking because it considers various segments of information obtained during the pre-bid investigation such as drawings and specifications, time constraints, and all of the complexities inherent to the

²² UDOT Bid Documents, Clay Hills Pass ER-052(1), Plan Section, Sheet 3.

²³ UDOT Bid Documents, Clay Hills Pass ER-052(1)

different site conditions such as surface topography, anticipated subsoil conditions, weather, material supply, local subcontractors, and labor conditions as to their restrictive effects on the sequential relationships among the various segments of the project. All of this plus the application of past knowledge and experience and the company's resources and skills translates into competitive estimates.

All these various segments were applied to the estimate on the Clay Hills Pass Project by Procon's estimators and management.

Estimating Conclusions

1-Subsoil: Using all the above information it was concluded that the subsoil consisted of a dense, gravelly/sandy material partially cemented but economically rippable material with no blasting anticipated, containing very little voids(boulders) with a load efficiency factor of 90% and which would require minimal water for compaction.

2-Topographical: 42% of the excavated materials would be placed in the embankment located at the base of a 200 foot deep depression. 58% of the material would be placed directly south of the excavation which would not require the hauling equipment to travel steep grades. Material placed for access roads outside the two designated areas would not require compaction.

3-Weather: This was not a factor in that the project time frame for completion was during the spring and summer months.

4-Time Constraints: Procon's estimators concluded that the

90 working days did not seem out of line, nor would it require any extra overtime hours or work days at the time of the bid estimate.

5-Skilled labor: Was available without difficulty.

6-Material supplies: Logistically difficult and expensive, but available and anticipated in the bid pricing.

Methodology of Construction

Because of the topographical constraints of the required cut and fill areas, Procon decided that a large backhoe/truck operation would be more efficient in handling those constraints than would a scraper operation.

The trucks planned were a Caterpillar product which had 6x4 wheeled drive capability which could efficiently handle the steep grade required in the placement of the embankment material and any adverse trafficability encountered. They were articulated which gave them a high degree of maneuverability which would be required because of the relatively tight operating conditions dictated by the site topographical conditions. They also had a relatively short width, therefore, enabling them to operate under narrower access requirements. They had a high rate of travel and were very fuel efficient. They had a rated capacity of 40 Tons ~~or~~ 32 Cubic Yards. All of these factors made the reasonably suited for this project.

Using all the aforementioned information, Procon estimated these trucks would carry 26 bank yards per truck load. It was estimated that two of these trucks would meet the production

requirement of the project.

Because of the "sliver" type cut designed and in the effort to eliminate any "over cutting" which would be required if dozers were used to cut the sliver portion of the project, Procon decided to use a large track-mounted backhoe for cutting this area which could also be used for loading the trucks. The backhoe had a 2 1/2 to 3 cubic yard capacity bucket.

Because of the anticipated type of material which would be encountered in the cut area and the anticipated requirement to build access roads into the embankment area, two(2) track-mounted dozers with rippers were used in the estimate. These dozers were to be used to rip and doze the material to the backhoe for a more efficient loading operation. They were also anticipated to be used in building an access road into the embankment area and dozing the waste material to the immediate right of the cut area. Two Komatsu 155-A type dozers were used in the estimate. These tractors are slightly larger than a Caterpillar D-8 Dozer.

A self-propelled vibratory, sheeps foot, compactor was used in the estimate to handle the compactive efforts along with the use of a 14G motor patrol to knock-down and spread the excavated materials in the embankment area.

Procon anticipated that the backhoe would cut the sliver excavation down to an elevation level which would allow an efficient loading operation. At the same time, the dozers would be building an access road to the embankment and moving some of the materials into the waste area.

Procon estimated that approximately 20% of the total estimated excavation quantity would be required to be used in the construction of the access roads which would require no compaction because it was outside the embankment and designated waste fill area. An additional 20% of the total excavated material would be placed into the designated waste area immediately to the right of the excavation area by dozers leaving approximately 18% of the excavated material to be hauled to the waste area by truck. This haul was to be on relatively level ground with the material dumped on level ground and placed by dozer. This area was to receive a 90% compaction effort. 42% of the excavated material was designated by the plans to be placed in the embankment. This material was anticipated to be moved by truck. As the elevation of the embankment increased, the length and steepness of the access grade would decrease; therefore, Procon estimated approximately 1/2 of the embankment material would be hauled under extreme conditions due to the grade percentage and the remaining half under less than extreme conditions which would improve as the elevation of the embankment continued to increase. Therefore, only approximately 20% of the estimated excavation quantity would be hauled and placed under extreme requirements. This percentage of effect on the operations and efficiencies of the equipment was taken into consideration during the estimate for this project.

Bid results

Procon Corporation was not the apparent low bidder at the

time of the bid opening.¹⁵ The apparent low bidder was more than 21% below Procon's submitted bid, but was ultimately rejected by UDOT for having failed to comply with the MBE requirements. The unit prices submitted indicate the majority of the bidders were consistent in their analysis of the project requirements with those of Procon's estimator/managers.

Procon's bid was less than 1% below the next bidder and less than 10% below the next 4 bidders. Procon's unit price for excavation exactly matched the apparent 3rd bidder and was actually above the apparent 4th bidder and approximately 12% above the apparent low bidder. Therefore, it is very apparent by the bids submitted that the majority of the bidders on this project did not anticipate any blasting requirements nor any other extra ordinary problems which were also not considered by Procon in its estimate.

¹⁵ UDOT, Bid Results Abstract

CONTRACT CONCLUSION

UDOT issued this bid proposal giving specific indications as to the soil consistency. The Project Engineer substantiated that information on the pre-bid job tour. The general site conditions and scope of the project was in a "slide and/or moving condition" which would indicate it would not require any type of blasting effort.

Procon relied upon UDOT's superior knowledge as to the soil conditions which would be encountered on this project. Procon also noted that by issuing the type of data found on page 3 of the plans, UDOT must have tested the materials and thereby possessed a superior knowledge. Procon also noted that UDOT was involved with an on going road maintenance and repair program in this very location; therefore, Procon reasonably assumed UDOT had, or should have had superior knowledge as to the soil conditions the prospective bidders were to expect at the site and would have the duty to disclose that knowledge. Using that knowledge, UDOT set a reasonable time for completion. The contract time obviously contained no allowance needed for an anticipated blasting requirements. Procon, therefore, reasonably relied on the implied warranty that the plans and specifications were correct and that the representations made by the Project Engineer was based upon the stated superior knowledge of UDOT which UDOT had the duty to disclose to the prospective bidders. Therefore, Procon did not reasonably expect nor

anticipate the adverse conditions actually encountered by Procon during the performance of the work.

The subsurface conditions actually encountered certainly differed substantially and materially from those indicated in both the contract and the parol information provided. According to that parol information, the subsurface conditions actually encountered were of an unusual nature, differing materially from those ordinarily and previously encountered by by others, including the maintenance forces of the UDOT, in the same area.

The latent and unknown subsurface conditions actually encountered could not have reasonably been anticipated by Procon given the information provided before the bid. From the information provided, those conditions were apparently unknown to even UDOT design engineers who had the availability of additional and superior knowledge and more than a year to research and design this project.

The bid results reflect that the majority of the contractors bidding the project concurred with Procon's bid conclusions.

Upon encountering the adverse subsurface conditions Procon's personnel immediately called those conditions to the attention of the Project Engineer, both verbally and in writing . He promptly investigated the conditions by making certain tests, taking pictures and keeping job records. He stated to Procon project personnel that he agreed with the changed conditions and indicated that he had recommended to his superiors the need to grant time extentions for this project although no written

response was ever received by Procon.

Procon submitted an accurate and reasonable bid to UDOT for this project. Procon expressly and reasonably relied upon the implied warranty of the bid plans and specifications and the superior knowledge of UDOT project personnel to compile its bid. UDOT had several years in which to research the design of this project. UDOT, by the indicated bid data supplied, apparently tested the materials and had available to them previous records of prior projects and maintenance data to rely upon. UDOT had the duty to provide clear and concise plans and specifications and to disclose any superior knowledge and information which would affect the bid. UDOT has impliedly warranted that those plans and specifications, if followed, will be adequate for the purposes intended. UDOT issued plans that were defective in that they were not accurate plans for the project represented. The centerline profiles as shown on page 6 of the bid plans and specifications were totally inaccurate and did not match the centerline as staked even though the Project Engineer states the centerline had not changed from the plan location as shown on page 5 of those plans. The designated waste area was changed from the area shown and stated on the plans and specifications page 3 without notification to the Procon. The information contained on page 3 was information for a mass diagram design with consideration given to "in place yards" used in the construction of fills and embankments and had no place in this project which was to be paid on a excavated yard, but only added

confusion of interpretation of terms and intent. Procon is not required to exercise clairvoyance in the interpretation and is entitled to rely upon the information expressly represented by UDOT through documents and officials.

UDOT grossly failed in their duties and caused great damage and harm to Procon even to the point of forcing Procon to cease to do business. UDOT was the drafter of the incomplete and defective plans and specifications, not Procon. UDOT has unjustly benefitted by the enormous increase in the amount of extra work required to complete the excavation portion of the project which was unforeseen and brought about by the misrepresentation of the unforeseen conditions and changes to the scope caused by actions of UDOT. Those actions caused Procon to experience a great amount of disruption to the prosecution of planned work such as delay, acceleration, cost over-runs and disruption of scheduled methodology of the work just to list a few of the damages. The insuing delay caused Procon to be required to have their managerial and construction talents available for the prosecution of this work substantially beyond what was anticipated costing Procon a great deal of additional cost. This required Procon's key people and equipment to be tied up for an extended period of time on this one job. This unforeseen delay also caused Procon to fail to be able to close out the project within the projected time forcing Procon to finance the project and suffer unforeseen and substantial carrying costs in interest.

Because of these negligent acts, Procon has been forced out of business, thereby losing its standing in the business community, suffering loss of credibility with lending institutions and business credit, loss of bonding line, loss of equity in capital equipment, the loss of business investment and start-up capital, loss of subcontractor credibility causing subcontractor claims; thereby increasing legal fees and the total loss of projected profits and trained supervisory personnel. A major loss has been suffered by Procon's principals in their personal investments of money, time and emotional well being.

UDOT failed to respond to all of Procon's written and verbal requests concerning the changes; therefore, UDOT failed in its time is of an essence duties.

If UDOT indeed had superior knowledge and information concerning subsurface conditions which would have influenced the bid pricing and failed to provide that information to prospective bidders before the bid then UDOT failed in its contractual duties.

SECTION F

CLAIMS OUTLINE AND QUANTUM

CHANGE OF DESIGNATED WASTE AREA LOCATION-CLAIM I

On March 19th, two days after time for construction began on this project, UDOT began staking the designated waste area boundaries. Instead of staking the area immediately to the right of station 864+25(+/-) to 867+25(+/-) as was designated on the plans¹⁶ UDOT staked the boundaries to the right of the embankment approximately 867+25(+/-) to 871+00(+/-). No written notification was issued and no change order was issued. On April 14, 1986 Procon issued a letter to the Project Engineer notifying him of the change and the possibility of additional costs. Procon received no written response.¹⁷

Subclaim I-A: Change in Hauled Quantity

This change caused 100% of the excavated material to be placed in the 200 foot deep depression which required all but the estimated 20% of the total material used for the building of the access road to be loaded and hauled-in-place instead of the bid amount of 72,947 cubic yards or 42%. The total additional yardage loaded and hauled-in-place is estimated to be 85,367 C.Y. (204,100 Pay C.Y. - 30,000 C.Y. Access Road = 174,100 C.Y. hauled-in-place, less 72,947 C.Y. bid embankment less 1/2 original haul to waste area = (15,786 C.Y.) = 85,367 C.Y.

¹⁶ UDOT Bid Documents, Clay Hills Pass, ER-052(1), Plan Section, Sheet 3.

¹⁷ Procon letter to UDOT, 4-14-86

additional material required to be loaded and hauled-in-place.)

1-Total additional costs to load the additional 85,367 C.Y. amounts to \$.10 per cubic yard x 174,100 C.Y. loaded and hauled-in-place for a total cost of \$17,410.00.

2-Total additional costs to haul the additional 85,367 C.Y. amounts to an additional \$.20 C.Y. x 174,100 C.Y. loaded and hauled-in-place for a total additional cost of \$34,820.00

3-Additional haul length for 18% of material estimated to be placed in the original waste area by truck haul(additional time) which includes time loss due to grade, access and distance = 118 hours.

4-Loader inefficiency due to additional haul length of 18% of materials estimated required haul to original waste area to new embankment = 42 hours x Mitsubishi 380-2 backhoe @

\$125.09/hour = \$5,253.78

42 hours x Operator @ \$36.39 = \$1,528.38

Sub-Total for additional load and haul= \$59,012.16

3% Overhead 1,770.36

15% Mark-up 9,117.38

Total Claim \$69,899.90

Total Impact hours = 160 hours delay.

Subclaim I-B: Change in Compactive Quantity

This change caused 100% of the material to be placed with a compactive effort, even the material used for the access road, in that the access road was now within the designated waste fill area instead of the estimated 80% as outlined previously. Therefore, all materials placed for the access road had to be re-excavated and placed in compactive lifts which was not anticipated on the original bid. This required the pulling off of either a dozer or the excavator/loading equipment to accomplish this task, which shut-down or delayed the hauling operations. This change also caused Procon to simultaneously place and compact the waste area along with the embankment, thus overloading the compactor's capability to keep up with production; therefore, loaded trucks were required to "wheel-roll" compact areas to keep the compactive production level even with the haul and place operations.

1-Additional Costs to compact the additional 30,000 C.Y. used for the access road = 90 hours x \$50.56/hour compactor =	
	\$4,550.00
90 hours x Oper.= \$35.56/hour =	<u>3,200.00</u>
Sub-total	\$7,750.00

2-Equipment time used to expedite compactive effort in new waste area:	
DJB Trucks 145 hours x \$103.11 =	\$14,950.95
Drivers 145 hours x \$ 31.65 =	<u>4,589.25</u>
Sub-total	\$19,540.20

3-Inefficiency of loading operations due to extra compactive effort by trucks:

Komatsu 260 Loader 123 hours x \$155.95 = \$19,181.85

Operators 123 hours x \$ 36.13 = 4,443.99

Sub-total \$23,625.84

4-Dozer time spend on excavating access road material to be recompacted: Komatsu 155-A Dozer 108 hours x \$217.03 =

\$23,439.24

Dozer Operator 108 hours x \$36.13 = 3,902.04

Sub-total \$27,341.28

Total Direct Costs Subclaim I-B \$78,257.12

Total Impact hours = 123 hours.

Subclaim I-C: Added topographical obstical

This change also caused materials to be placed in several deep vertical topographical coves which were not shown on the plans and would not have been a factor in the original bid because these coves where located out side of the designated fill areas. The location change caused all of the materials placed in these coves to be compacted which required extraordinary effort using equipment other than the compactor to reach the narrow reaches of these various coves. This, in turn, caused inefficiencies in the placement and compaction of the materials in both the embankment and the waste areas. This was both unanticipated in the original bid and unforeseen due to the unannounced change. This also required excavating equipment to be used to excavate material out of the coves to be re-compacted as the subgrade lifts were placed.

1-Extra compactive efforts made by compactor:

Compactor @ 76 hours x \$50.56/hour =	\$ 3,842.56
Operator @ 76 hours x \$35.56 =	<u>2,702.56</u>
Sub-total direct costs	\$ 6,545.12

2-Extra compactive efforts made by off-highway trucks:

DJB trucks @ 96 hours x \$103.11	\$ 9,898.56
WABCO 35 Trk. 10 hours x \$110.15	1,101.50
Trk. Drivers @ 106 hours x \$31.65	<u>3,354.90</u>
Sub-total direct costs	\$14,354.96

3-Equipment time spent excavating material from coves for recompaction:

Komatsu 155-A 186 hours x \$217.03 =	\$40,367.58
Cat. D-8 46 hours x \$180.26 =	8,291.96
Komatsu 260 Ldr. 107 hours x \$155.95 =	16,686.65
Universal Oper. 339 hours x \$36.13 =	12,248.07
Komatsu 450 Ldr. 21 hours x \$93.03 =	1,953.63
Loader Oper. 21 hours x \$31.15	<u>654.15</u>
Sub-total	\$80,207.04

4-Excavation inefficiency Impact caused by the loss of productivity of the dozers due to the additional work excavating the coves:

Total impact on dozer productivity of 15% = \$.085/C.Y. x
204,100 C.Y. = \$17,348.50

5-Inefficiency Impact on loading operations due to the additional work excavating the coves:

Total impact on loading productivity of 21% = \$.18/ C.Y. x
204,100 C.Y. = \$36,738.00

Total Direct Costs of Subclaim I-C \$155,193.62

Total Impact Hours = 128 hours

Subclaim I-D: Dozer inefficiency

The required placement of 100% of the materials in the 200 foot "hole" caused the inefficient use of the dozers in that they could not be used as a production and spreading unit. In other words, it was anticipated in the bid that the dozers could be excavating and placing materials in the original waste area by slot dozing the material off of the excavated area on to the waste area. The relocation of the waste area caused the loss of that ability. The dozers now had to be pulled off of the excavation area and travel down 500 to 1000 ft to help spread the material in the new waste area. Eventually, this condition required Procon to hire additional equipment to be placed on the fill full time to maintain production. This changed not only the efficiency factor on dozer production tremendously, but also increased the cost of operations by requiring the hiring of additional equipment, plus idling the planned use of the Motor Patrol. The motor patrol was required to be available for clearing the highway of overburden materials, but could not be used for the purpose intended.

1-Dozer lost time on spread production due to waste relocation:

Komatsu 155-A Dozer 79 hours x \$217.03 =	\$17,145.37
Dozer Operator 79 hours x \$36.13 =	<u>2,854.27</u>
Sub-total	\$19,999.64

2-Additional spreading and knockdown Equipment required by
waste area relocation:

Cat. D-6 Dozer 36 hours x \$81.74 =	\$ 2,942.64
Cat. D-7 Dozer 250 hours x \$115.31 =	28,827.50
Cat. D-8 Dozer 148 hours x \$180.26 =	26,678.48
Dozer operators 434 hours x \$36.13 =	<u>15,680.42</u>
Sub-total	\$74,129.04

3-Dozer inefficiency due to time loss on waste area
relocation: Total impact Dozer productive hours lost = 123 or \$
.13 x 204,100 C.Y. = \$26,533.00

<u>Total Direct Costs Subclaim I-D</u>	\$120,661.68
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Total Impact hours = 123 hours

Subclaim I-E: Inefficiency of Haul Units

Placement of 100% of the excavated materials in the "hole" by truck haul increased the inefficiency of those machines by increasing the extreme operating conditions from the estimated 20% haul to over 50% causing an increase of down time due to mechanical failures, loss of estimated fuel efficiency, loss of production efficiency by increasing the operating production cycle time by extending the haul distance and haul conditions.

1-Total loss of productive capability due to extended down time caused by extreme conditions = 21% loss = \$.08/C.Y. x 204,100 C.Y. = \$ 16,328.00

2-Idle labor caused by additional down time = 173 hours additional beyond estimated x \$ 31.65/hour = \$ 5,475.45

3-Truck productive loss impact on Loading efficiency = \$.03/C.Y. = \$ 6,123.00

Total Direct costs Claim I-E \$ 27,926.45

Total impact hours 87 hours

Subclaim I-F Extended Direct Costs

1-A total of 621 Impact hours or 62 working days due to additional work requirements and loss of efficiency as listed caused the extension of direct cost items.

a) Foreman @ \$37.06 =	\$ 23,014.26
b) Mechanic @ \$36.13 =	22,436.73
c) Gradesetter @ \$35.36 =	21,958.56
d) Foreman's Pick-up @ \$5.57	3,458.97
e) Mechanic's truck @ \$6.57	4,079.97
f) Lube Truck @ \$11.03	6,849.63
g) Fuel Truck @ \$11.03	6,849.63
h) Welder @ \$9.06	5,626.26
i) Compressor @ \$10.69	<u>6,638.49</u>
<u>Total Direct Costs Claim I-F</u>	\$100,912.50

Subclaim I-G Extended Field Costs

1-The extended conditions also impacted the direct field costs by the 621 hours or 62 work days at 10 hours per day or 2.82 months @ 22 working days per month.

a) Project Management @ \$2,000.00/month =	\$ 5,640.00
b) Project Superintendant @ \$38.39 =	23,840.19
c) Phone & Communication @ \$200.00/Mo.=	564.00
d) Management Subsistance 92% increase =	828.00
e) Office Trailer @ 150.00/Mo. =	423.00
f) Sanitation @ \$290.00(LS) 92% increase =	266.80
g) Job signs @ \$3,000.00 x 92% increase =	2,760.00
h) Job Photos @ \$200.00 x 92% increase =	184.00
i) Time keeping @ \$500.00/mo. =	1,410.00
j) Additional Mobilization = D-6	1,100.00
D-7	1,320.00
D-8	1,840.00
WABCO 35	<u>3,004.00</u>
<u>Total Direct Cost Claim I-G</u>	\$ 43,179.80

TOTAL CLAIM AMOUNT FOR CHANGE OF DESIGNATED WASTE AREA LOCATION

CLAIM-I

\$585,143.33

CHANGED SUBSURFACE, LATENT PHYSICAL CONDITION AND CHANGE OF SCOPE
FROM STA. 862 +00 TO 867+00 PLUS OR MINUS-CLAIM II

Within a few days after excavation began Procon began to encounter very large, tightly packed, boulders ranging from 4-12 feet in diameter in the area of station 862+00(=/-) to 867+00 (+/-).¹⁸ This was the area in which the plans had indicated a 5% shrink.¹⁹ The material encountered, as described, contained large voids upon excavation which is inherent by its very nature. The material encountered; therefore, did not conform in any manner to materials that could be expected or anticipated by the review of the bid specifications especially in consideration of the specified shrink factor for materials in this area as stated in the bid documents. The UDOT would have had to test this material in order to provide such information, yet no indication of this material was issued anywhere.

The boulders encountered were numerous and large. They were extremely difficult to handle causing a significant loss in efficiency of production. Operating conditions encountered by the excavating and loading equipment changed from moderate to extreme, thus increasing the operating costs, repair costs and down time. The materials were too large to be handled by the planned equipment requiring Procon to replace said equipment with equipment of higher costs. This, in turn, caused a disruption in

¹⁸ Procon, Labor & Equipment Distribution; Procon job pictures

¹⁹ UDOT Bid Documents, Clay Hills Pass ER-052(1), Plan Section Sheet 3

the schedule of work and a disruption in the the method of performance or construction methodology planned.

Replacement equipment was needed to handle the spreading and knockdown the material hauled and placed in the fill area because of the size and number of boulders was much too large and exceeded the capabilities of the planned 14G motor patrol estimated in the bid. Because of the increased difficulty of handling the material in the area of excavation, loading and placement, the productive efficiency dropped to near 50% of the estimated amount. Because of the increase in voids due to the size of the materials, the hauling efficiency significantly causing a significant loss of hauling capacity and thereby substantially reducing the productive capability of the haul units. This loss of productivity had a great impact on the extended time required for completion.

Notice was given verbally to Ferd Johnson, UDOT inspector in the field on March 18, 1986 of the changed subsurface conditions. Mr. Johnson was on the job site daily for a visual inspection.²⁰ The Project Engineer was notified in writing on April 14, 1986 of Procon's contentions and concerns, but visually reviewed the situation in response to Procon's verbal complaints on April 3, 1986 and again on April 14, 1986. The Project engineer indicated to Procon's field superintendant that the "material should get better at a lower elevation" indicating the hard material and

²⁰ Procon Corporation, Equipment & Labor Distribution Reports

large boulders are "most likely just a layer".²¹

Procon received no written reply to its April 14, 1986 notification letter.²² On 4-10-86 Procon's field superintendant was notified by the UDOT inspector that the project's centerline had changed from that which was indicated on the bid plans. He indicated further that the revisions made to the bid plans were made in the office and that the designers had not been in the field to review the project before the revisions were made and that several sheets in the bid documents were not even part of the revised bid documents. Some of the bid sheets were for a different design altogether.²³ On 4-29-86 the Project Engineer took pictures of the problem areas. On 5-07-86 the District 4 Engineer came by to review the project and indicated to Procon's field superintendant that the UDOT designers did not anticipate this kind of tough materials on the project.²⁴ On 5-14-86 the Project Engineer took samples of the ledge material and indicated that it probably could not be tested for compaction; therefore, instructed Procon's field superintendant to "just wheel roll into the fill and no tests will be taken".²⁵ On 5-30-86 the Project

²¹ Procon, Labor & Equipment Distribution

²² Procon 4-14-86 letter to UDOT

²³ Ibid

²⁴ Procon, Labor & Equipment Distribution

²⁵ Procon, Field Superintendant Diary

Engineer indicated to Procon's field superintendant that he had estimated a 10% swell factor between the embankment and the cut for the materials which had been excavated between stations 862+00 to 867+00.²⁶ This was a change of 3 times from that which was indicated on the bid plans which had a tremendous impact upon the load factor of the materials and material handling.

Subclaim II-A: Inefficient Ripping Operations

This change of conditions caused the loss of efficiency in the ripping operation of approximately 50%.²⁷ This was a direct result of the ripping operations encountering densely packed boulders which contained nonuniformed, and tightly compact bedding joints and fractures. This required unanticipated cross-ripping, and inefficient tractor positioning and direction to achieve the proper "tooth angle" on the ripper to allow tooth penetration in order to effectively rip the material. This had to be done by an "trial and error" method which was greatly aggravated and complicated by the topographical conditions inherent in the working area.

A combination of continual ripping, dozing and excavating, many times by a combination of machines, was normally required to excavate and handle each one of numerous large boulders. This contributed to the substantial loss of ripping efficiency.

²⁶ Idib

²⁷ Procon, Production Comparison Sheets

1-Inefficiency of Labor and Equipment total loss of
Production:

Komatsu Dozer 155-A x 527 hours @ \$217.03 = \$ 14,374.81

Dozer Operator 527 hours @ \$36.13 = 19,040.51

Sub-total Direct Costs \$ 33,415.32

Total Impact hours = 527 hours.

2-Increased repair down time and lack of availability due to
extreme conditions not anticipated caused by changed conditions =
105 hours additional down time = 26% loss of availability =
\$.15/C.Y. x 204,100 C.Y. = \$30,615.00

3-Inefficiency impact on loading operations due to dozer
inefficiency caused by changed conditions causing a 55% increase
in loading time = \$.33/C.Y. x 204,100 C.Y. = \$67,353.00

4-Disruption of the Method of Performance due to changed
conditions which caused extended conditions requiring Procon to
be forced to extend the use of Dozers under extreme circumstances
which required Procon to replace one of the dozers for a dozer at
a higher rate than what was included in the bid.

Rate difference between the rented Komatsu dozer and the
rented Cat. D-8 = \$78.82/hour. A total of 196 hours was used in
the production area = \$15,448.72

Total Direct Costs for Subclaim II-A \$146,832.04

Total Impact Hours = 527 hours

Subclaim II-B: Inefficient Excavating/Loading Operations

Because of the changed subsurface condition, the planned excavating operations experienced a 45% loss of productivity in it's estimated operations.²⁸ This was a direct result of the stated magnitude and considerable volume of the massive materials encountered which exceeded the capabilities and capacities of the planned equipment involved in those operations. The 4 to 12 foot boulders could not be efficiently excavated by a single dozer; thereby requiring the use of both available dozers, sometimes in combination with the backhoe, in order to facilitate the excavation of that material. This mass and magnitude of the material also exceeded the handling capabilities of the backhoe. The backhoe; therefore, could not efficiently excavate the material, nor handle the material once excavated for loading.

This type of materials could not and was not anticipated nor foreseen from all available information gathered at the time of the bid and was a change from the material specified in the bid plans and documents.

1-Loss of efficient excavation production of 50% due to the decrease in the loadability and the increased size of the material causing an additional \$.09/C.Y. x 204,100 C.Y. =

\$18,369.00

²⁸ Procon, Production Comparison Reports

2-Disruption of work methodology forcing Procon to change equipment which was caused by the subsurface material change:

Komatsu loader 450 hourly costs difference between 380
Mitsubishi backhoe = \$3.60 hours x 176 hours = \$ 633.60

Komatsu loader 260 hourly costs difference between 380
Mitsubishi backhoe = \$44.04 x 653 hours = \$ 28,758.12

Idle Cat. 14G Motor Patrol due to inability to handle
changed materials, yet was needed to accomplish part work
throughout the progression of the project. Idle time = 175 days
x \$136.36/day = \$ 23,863.00

Total Direct Costs of Subclaim II-B \$ 71,623.72

Subclaim II-C: Inefficient Loading Operation

As stated, the change in subsurface conditions exceeded the capability and capacity of the backhoe used as a loading unit. This caused a 60% loss in the estimated production capacity of that machine and in some cases made it totally impossible for the machine to handle any of the excavated materials. This inefficiency caused by the stated soil conditions caused Procon to be forced into replacing the planned loading unit with larger, more expensive rubber-tired loaders in an effort to allow the loading operation to more effectively and efficiently meet the soil conditions encountered. This change was not only dictated by the circumstances of the sheer mass and quantity of the unforeseen, massive materials, but in making the forced and unplanned change, Procon suffered an increase in the cost of the loading operation, plus this forced change caused Procon additional mobilization costs and a loss of production caused by a disruption of the methodology of performance(routine).

1-Replacement of existing equipment to increase production due to change of materials, plus loss of multiple capabilities equipment as was planned:

WABCO 35D Truck cost difference = \$47.23/hour x 318 hours
for a cost difference = \$ 15,019.14

Scraper Cost Difference = \$76.81/ hour x 483 hours for a
cost difference = \$ 37,099.23

John Deere 690 backhoe 43 hours x \$62.79/hour = \$2,699.97

Total Direct Costs Subclaim II-C \$ 54,818.34

Subclaim II-D: Decrease in loadability of materials

As stated, the material encountered in the field differed considerably with that which was indicated on the plans. As state previously the Project Engineer estimated a 15% increase in the compacted swell factor from material encountered from a stated 5% shrink to a 10% estimated swell. This caused a change from an estimated 15% load factor to approximate 40% load factor²⁹; thereby reducing the efficiency factor of the planned equipment substantially. This caused a disruption of planned work schedule thereby extending the time required for completion which in turn caused extended field costs and O.H. The corresponding loss of efficiency due to the increased load factor caused a disruption in the planned cash flow placing a unexpectedly, heavy financial burden on Procon Corporation.

1-Loss of Equipment efficiency due to increased load factor caused by material change: \$.40/C.Y. x 204,100 C.Y. = \$81,640.00

2-Labor and equipment idle time due to lack of material caused by changed conditions:

Foreman 96 hours =	\$ 3,557.76
Pick-up " " =	534.72
Driver 17 hours =	538.05
Operators 22 hours =	794.86
Mechanic 118 hours =	4,263.34

²⁹ Procon, Production Comparison Reports

Mechanic truck 118 hours =	787.06
Gradesetter 70 hours =	\$ 2,475.20
Off-road Trucks 16 Days	12,243.00
WABCO off-road trk. 7 days	5,916.75
Superintendant 118 hours	4,530.02
Pick-up 118 hours	657.26
260 Komatsu Loader 11 Days	12,243.00
Mitz. 380 Backhoe 5 Days	<u>5,880.00</u>
Sub-total	\$ 54,946.02
<u>Total Direct Cost Loadability Subclaim II-D</u>	\$136,586.02

subclaim II-E: Blasting

As the excavation continued, the physical consistancy of the materials encountered continued to change and become more cemented and solid to the point it was no longer economical to continue to rip. The material had no seams or fractures which would allow tooth penetration with the rippers. Blasting was required to fracture the materials. Normal drill patterns were used, but did not provide the desired results; therefore, the drill patterns were tightened and more blasting materials added to each drill hole. The material remained very tight even after this extra heavy blasting practice was instituted. Heavy ripping was still required to loosen the blasted materials. Large chunks of excavated materials were the results of the blasting/ripping combination causing a continued loss of equipment efficiency and availability.

Blasting, by its very nature caused an increase in the costs of production over and above the submitted bid price. As stated, material in this area was stated to have a 5% shrink factor which certainly is not consistant with material requiring blasting. No other available information at the time of the bid would give any indication as to this type of solid materials. Therefore, this was a changed condition unforeseen and unanticipated and varied from that which was originally anticipated from the implied conditions contained in the specifications. The conditions were also different from those represented by the Project Engineer. Therefore, this condition could not be reasonably anticipated by

Procon through any other information available to it at the time of the bid.

UDOT was notified verbally on 5-23-86 of the requirement to blast this area and Procon's intentions of submitting for claim.³⁰ This was followed up by a written notifications on 5-28-86 and again on 6-20-86. Blasting was required extensively from Station 862+00 to 867+00 all the way down to subgrade tremendously effecting construction performance from the estimated production. This was the area noted on the plans as having a 5% shrink factor. Additional blasting was required 852+00 to 862+00. This cause tremendous financial strain on Procon causing a loss of equipment suppliers, subcontractor credibility, loss of business credit, additional interest and credit costs.

Total Direct Costs for Subclaim II-E = \$116,941.93

³⁰ Procon, Labor and Equipment Distribution

CHANGED SUBSURFACE CONDITION AND LATENT PHYSICAL CONDITIONS FROM
STA. 852+00 TO 862+00 PLUS OR MINUS-CLAIM III

While proceeding to build an access road to excavate the sliver cut portion of the project, the backhoe hit a solid ledge material on approximately 4-16-86³¹ that was neither penetrable by backhoe nor ripper. This material was approximately 40 feet thick and was in the area of station 861+00 to 858+00 plus or minus. This material was a solid ledge type of material with no seams nor fractures, thus varying dramatically with the material indicated on the plans and directly opposed to all other available information. The material was encountered approximately 20 feet down from the top of the sliver cut. Material encountered under this ledge was consistent with the material specified on the plans until approximately 40 to 50 feet from subgrade. The material from that point on required blasting until subgrade was reached. During drilling, mud was encountered oozing through the layers. This gives an indication of the inconsistency and unpredictability of the subsurface soil encountered. It should be noted that very little water was required for compaction because of the high moisture content of this soil. The existence of clay type mud contributed to inefficiencies of the blasting performance, by providing a cushion effect absorbing the blast shock.

The conditions encountered in this area could not be

³¹ Procon, Labor and Distribution Reports

reasonably anticipated from the interpretation of the implied conditions contained in the specification nor from any other source available at the time of the bid.

All subclaims in this area are consistant with those experienced in the heretofore named claims for stations 867 through 862+00.

Extended Direct Costs for a total impact of 527 hours:

Foreman @ \$37.06/hour =	\$ 19,530.62
Mechanic @ 36.13/hour =	19,040.51
Gradesetter @ 35.36/hour =	18,634.72
Foreman's pick-up @ 5.57/hour =	2,935.39
Mechanic's truck @ 6.57/hour =	3,462.39
Lube truck @ \$11.03/ hour =	5,812.81
Welder @ \$9.06/hour =	4,774.62
Fuel truck @ \$11.03/hour =	5,812.81
Compressor @ \$10.69/hour =	<u>5,633.63</u>
<u>Sub total for Claim III-A</u>	\$ 85,637.50

2. Extended Direct Field Costs @ 527 hours or 53 days or 2.4 months:

Project Manager @ \$2,000.00/month =	\$ 4,800.00
Project Superintendant @ \$38.39/hour =	20,231.53
Phone Charge @ \$200.00/month =	480.00
Management subsistance 55% increase =	459.00
Office Trailer @ \$150.00/month =	360.00
Sanitation @ 290.00/month =	696.00
Job Signs @ \$3,000.00 x 55% =	\$ 1,650.00

Job Photo @ 200 x 55% =	110.00
Time Keeping @ \$500.00 =	1,200.00
Mobilization:	
Scrapers	3,456.00
J.D. 690 B.H.	840.00
Komatsu Loader 450	1,940.00
Komatsu Loader 260	<u>3,390.00</u>
<u>Sub total Subclaim III-A.2</u>	\$ 39,612.53
 <u>Total Direct Costs for Extended costs</u>	 \$125,250.03
3% Direct O.H.	3,757.50
15% Mark-up	<u>19,351.13</u>
<u>Total claim for Extended Costs III-A</u>	\$148,358.66

TOTAL CLAIM-II & III, CHANGE IN SUBSURFACE CONDITIONS

\$652,052.08

FAILURE TO RESPOND TO TIME EXTENTION AND CHANGE REQUESTS-CLAIM IV

Even though Procon submitted several requests in writing outlining the changed conditions and the legitimate requirements for a time of completion extention to the UDOT Project Engineer no written replys were issued.³² UDOT had a inspector daily and the site was reviewed by District officials and even Federal Highway officials, still Procon received no written response. Several verbal inquiries were made throughout the project with no definitive answer. The Project Engineer indicated on 10-21-86 to Procon's field superintendant that Procon delays were excusable and such extention was granted.³³ But Procon receive no written varification and in fact received copies of weekly progress issued by the Project Engineer which gave no indication as to the disposition of Procon's request.

This failure to officially respond to an excusable delay forced Procon to institute an accelerated schedule which caused labor inefficiencies, and a heavier performance burden upon the equipment used, thus causing and increase in loss time due to breakdowns. The acceleration required Procon to pay unplanned overtime premiums to working personnel which increased the cost of production and placed an additional unanticipated financial burden upon the company.

This failure also took away Procon's ability to effectively

³² Procon's letters dated 4-14-86, 5-20-86, 6-20-86, 6-23-86 and 10-12-86

³³ Procon, Superintendant Dairy

coordinate and plan subcontractor scheduling thus causing the loss of some subcontractors and suppliers. It disrupted Procon's financial forecasting and planning. It also disrupted Procon's field operations coordination by causing confusion as to what determinations had been made concerning the stated requests.

This failure also caused disrupted Procon's capability to and procure additional work. It also disrupted and confused Procon's surety relations by causing substantial concern and confusion as to UDOT's position.

1-Acceleration of Labor costs =	\$28,491.09
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CONTRIBUTORY TO DAMAGES: DEFECTIVE & INCORRECT PLANS AND SPECIFICATIONS-CLAIM V

The contractor has the right to rely upon the implied warranty of suitability of the issued bid documents and UDOT further has the contractual duty to issue drawings and specifications that are reasonably free from defects.

The Clay Hills plans were defective from the outset. The centerline profiles shown on page 6 of the plans was not consistent with the actual profiles as staked by UDOT in the field, thus causing a disruption in the planned methodology of work. The staked centerline had not changed from the location as shown on page 5 of those plans, yet page 6 refers to page 5 for location. UDOT personnel subsequently indicated the profiles contained in page 6 were for a previously designed project at the same location, but was deleted in favor of the present designed project; therefore, those profiles were wrong.

The Project Engineer informed Procon that the subsurface material had changed even under UDOT interpretation from a shrink of 5 % to a swell of over 10% estimated by field measurements. Therefore, the plans and specifications were faulty and Procon suffered additional costs and extra work as a result of UDOT malfeasance and a breach of the implied warranty.

- 1-Labor escalation(additional)
- 2-Additional Equipment
- 3-Loss of production, inefficiency
- 4-Winterization costs

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5-Travel expense escalation

6-Idle Equipment and Labor

7-Equipment standby costs

8-Subcontractor escalation(Winter)

9-Escalation of field costs

10-Extended logistics costs

Total Loss of Production of 10% = \$.25/C.Y. x 204,100 C.Y. = A

Total of \$51,025.00

FAILURE TO MAKE TIMELY PAYMENTS-CLAIM VI

Throughout this project UDOT has failed to make timely payments. UDOT Standard Specifications section 109.06 states that "Partial payments will be made at least once each month as the work progresses." The payment for work done in May of 1986 was not received until July 7, 1986.³⁴ Payment was not received until August 10, 1986 for work accomplished in June of that year. Payment for work accomplished in July was not received until September 11, 1986. Payment for work done in September & October was not received until January 17, 1987. Work done in November and December was not received until February 21, 1987. Work on the installation of 24-inch pipe was approved in October of 1986, but not paid until April of 1987.

During the pre-construction conference it was agreed upon for the Project Engineer to send in pay estimates on the 1st Saturday of the month following the work accomplished. Yet the May estimate was not submitted until June 17, 1986 over 2 weeks beyond the agreed upon date. June draw request was not submitted until the 14th of July over 1 week past the agreed upon date. September draw was not submitted, but was combined with October's draw and not submitted until November 10, 1986. November's draw was not submitted, but was combined with December's draw which was submitted January 10, 1987.

All these actions and failures are a violation of the "time

³⁴ Procon, Job File

page 57

is of an essence" portion of this contract and caused Procon to suffer the following damages:

Slow payments received and disruption of schedule =	21,105.08
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3-Disruption of Job Financing forecasting causing increased management time spent finding additional financing =

250 hours management time x \$35.00/hour	\$ 8,750.00
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4,650 mile travel @ \$.22/mile =	1,023.00
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70 hours computer time @ \$8.00/hour =	<u>560.00</u>
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<u>Direct Cost Sub-total</u>	\$10,333.00
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<u>Total Direct Costs Claim VI</u>	\$ 31,438.08
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SURVEY ERROR-CLAIM VII

On October 29, 1986 the UDOT inspector informed Procon's field superintendant that the UDOT surveyors had made, in mid October 1986, an error on staking the day light area between the stations 855+75 to 869+25. The error causing confusion which gave Procon's field superintendant the impression that there were only 5,000 yards left which could be completed with a dozer. This error caused Procon's superintendant to commit to several equipment suppliers to demobilize several pieces of their equipment at the end of October.

The error, according to Mr. Kirkham, was estimated to be a total yardage remaining to be excavated at over 15,000 cubic yards instead of the 5,000 cubic yards as previously informed by the Project Engineer. This caused Procon to replace the demobilized equipment with equipment of a greater costs and less efficiency, plus additional mobilization costs resulting in the following contributory damages which caused the total damages in the amount listed below.

- 1-Disruption of methodology
- 2-Additional mobilization
- 3-Inefficiency of Labor and Equipment
- 4-Uneconomical Procurement Cost
- 5-Higher Equipment Costs
- 6-Disruption of subcontractor coordination

7-Weather factor

Total Additional Costs over amount paid = \$8.39/C.Y. cost vs
\$2.1/C.Y. bid = \$6.29/C.Y. x 12,515 C.Y. paid = \$78,719.35

9-74 hours, or 7.4 days at 10 hours/day, or 42% of month
which extended direct field costs from the result of the the lost
productivity required by the above methodology:

Phone charge @ \$200.00/month =	\$ 84.00
Management Subsistance 13% increase @ \$900.00 =	117.00
Office Trailer @ \$150/month =	63.00
Sanitation @ 290.00 L.S.x 13% =	37.70
Job Signs @ 3000.00 x 13% =	390.00
Job Photos @ 200.00 x 13% =	26.00
Time Keeping @ \$500.00/month =	<u>210.00</u>
<u>Direct Costs Sub-Total</u>	\$ 927.70

<u>Total Direct Cost for Claim VII</u>	<u>\$79,647.05</u>
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GENERAL DAMAGES-CLAIM VIII

Because of UDOT's actions Procon suffered general damages to the effect.

1-Extended Home Office O.H.

Total Home office O.H. yearly

$\$100,042.85 / 365 \text{ days per year} \times 106 \text{ working days}$
extended = $\$274.09/\text{day} \times 106 \text{ days} =$ $\$29,053.79$

2-Loss of Contract close-out, (retention) = $\$46,824.42$

3-Loss of weather window caused winterizing equipment and lost production due to cold weather.

Winterizing equipment = $\$ 12,800.00$

Lost production on installation of roadbase due to frost
(see production sheets = $\$ 18,980.29$

4-Equipment restoration charges; direct charges from Equipment suppliers = $\$ 55,000.00$

5-Deferred compensation $\$ 33,500.00$

6-Extended insurance costs

$\$1,900.00/\text{mo} \times 6 \text{ months extention} + \$4,500 \text{ renewal charge} =$
 $\$15,900.00$

7-Loss of Subcontractors Equipment causing management to spend extraordinary time pursuing other sources:

$120 \text{ hours} \times \$35.00/\text{hour} =$ $\$4,776.00$

Travel 1280 miles $\times \$.22/\text{mile}$ 281.60

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10-Extended fuel because of heavy use:

30,583 gals x \$.64/gal =	\$ 19,573.00
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14-Loss of equipment equity:

Pick-up =	\$ 4,500.00
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Fuel Trucks =	4,000.00
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Office trailer =	1,200.00
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Patrol =	<u>20,000.00</u>
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	\$ 29,700.00
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15-Claims preparation total direct costs =	<u>\$ 25,000.00</u>
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<u>Total Direct Costs Claim VIII =</u>	<u>\$291,388.81</u>
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LOST PROFITS-CLAIM IX

Procon had estimated a profit mark up of 15%³⁵ The
projected lost profits on the changed and extra costs =
\$355,822.17

³⁵ See bid estimate sheet

ONE(1) TO TWO(2) FOOT THICK ASPHALT-CLAIM X

During Construction of the subgrade preparation Procon was required to obliterate the existing asphalt highway. During the removal of the existing asphalt, Procon hit Asphalt from 8" to 2 feet thick requiring the extra ordinary effort of Dozers causing a loss of productive capabilities. This differed from the drawings which indicated a typical asphalt thickness of 3-inches. See Production Sheet for detail. Total Direct Costs = \$ 7,536.37

PIPE EXCAVATION CHANGE TO STRUCTUAL EXCAVATION-CLAIM XI

UDOT reduced the total quantity of 24-inch CMP pipe from 250 L.F. to 50 L.F. and requested it be buried. This change order was approved, but UDOT erred by paying a roadway excavation price for structural excavation as submitted by Procon's original estimate; therefore, Procon is requesting an additional 2.50 per yard for the quantity involved in this excavation.

512 C.Y. Paid x \$2.50/C.Y. additional due for structural excavation = \$ 1,280.00

CHANGE IN CONTRACT SCOPE FOR GUARD RAIL QUANTITIES CLAIM XII

During the course of the contract the UDOT directed a change in the guard rail quantities to over 40% deletion. This changed the scope for the subcontracts bid. Procon submitted a request for a supplemental change order with no response from UDOT.

Guardrail override 1175'x \$2.66/foot =	\$3,123.86
Right of way markers 12 each x \$14.00/each =	168.91
Deliniators 48 each x \$1.20/each	57.60
Approach elements 4 each x \$108.60/each =	<u>434.40</u>
<u>Total Direct costs for Claim XII</u>	\$3,784.77

PROCON CORPORATION

CLAY HILLS PASS
UTAH DEPARTMENT OF TRANSPORTATION

SCHEDULE OF VALUE METHOD OF DAMAGE COMPUTATION "BLUE BOOK"

Amount Completed through
March 31, 1987/Application
for Payment

\$ 687,588.91

Additional work through Change of Scope

1)-Change in Haul Quantity	\$ 59,012.16
2)-Change in Compaction Quant.	78,257.12
3)-Change in Topo. Obsticals	155,193.62
4)-Dozer inefficiencies	120,661.68
5)-Haul unit inefficiencies	27,926.45
6)-Ripping inefficiencies	33,415.32
7)-Extended Idle equipment	30,615.00
8)-Loading inefficiencies	67,353.00
9)-Excavation inefficiencies	18,369.00
10)-Equipment Change(Dozer)	15,448.72
11)-Equipment Change>Loading)	29,391.72
12)-Equipment Change>Trucks)	15,019.14
13)-Equipment Change>Scraper)	37,099.23
14)-Idle Equipment(14-G patrol)	23,863.00
15)-Additional Equipment(B.H.)	2,699.97
16)-Loadability inefficiencies	102,050.00
17)-Idle Equip. & Labor(ineff)	54,946.02
18)-Blasting Costs	116,941.93
19)-Constructive Acceleration	28,491.09
20)-Interest on delayed payments	21,105.00
21)-Extended Management	15,390.00
22)-Deferred Compensation	33,500.00
23)-Survey error	79,647.05
24)-Extended Field Costs	325,216.05
25)-Extended Home O.H.	29,053.79
26)-Winterization of Equipment	12,800.00
27)-Lost Prod. on Road base(frost)	18,980.00
28)-Equipment Restoration	55,000.00
29)-Extended insurance	15,900.00
30)-Extended Fuel Costs	19,573.00
31)-Lost Equity(Equipment)	29,700.00
32)-Thick Asphalt	7,536.37
33)-Structual Excavation	1,280.00
34)-Change in G.R. Quantities	<u>3,123.86</u>
Total Value of extra work	<u>1,684,558.90</u>

Value of Work completed March 31, 1987 \$2,372,147.81

Balance forward .	\$2,372,147.81
Previous Payments	632,682.65
Amount due through March 31, 1987	<u>\$1,739,465.25</u>
Anticipated Profit on Costs	<u>355,822.17</u>
Total Value of Work through March 31, 1987	\$2,000,385.03
Interest @ 10% from termination to June 30, 1987	100,019.24
Claim Preparation to date	25,000.00
Interest from June to September 30, 1987	66,679.50
Projected Claim expense	<u>15,000.00</u>
Total Damages	<u>\$2,207,083.77</u>
	=====

Ex. 36-p

STRONG & MITCHELL
ATTORNEYS AT LAW
197 SOUTH MAIN—P.O. BOX 595
SPRINGVILLE, UTAH 84663
(801) 489-5632

DEC 1 1988

UTAH DEPT. OF TRANS.
CONSTRUCTION DIVISION

DON R. STRONG
HAROLD D. MITCHELL

November 22, 1988

Mr. Bert Taylor
Engineer for Construction
Utah Department of Transportation
4501 South 2700 West
Salt Lake City, Utah 84107

RE: PROCON vs. UDOT
CLAY HILLS PASS, PROJECT ER-052 (1)

Dear Mr. Taylor:

At the conclusion of the claims committee hearing on this matter several weeks ago, you asked that we provide some additional information. You specifically asked us to answer three questions:

(1) Is the contractor entitled to additional compensation because of his reliance on statements made by UDOT employees?

Whether Procon justifiably relied on such statements in preparing its bid is a question of fact. During the consulting team's investigation of the matter, we specifically inquired as to the information which was given to bidders in the pre-contract stage of the project. We found that all bidders were given the same information. We found nothing which the contractor should have relied on to believe that the nature of the project was different from the way it was shown in the written contract documents.

Procon has the burden of proving that UDOT personnel gave out information that it (a) relied on, (b) that such reliance was justified, and (c) that the information was incorrect. We are not aware of any information which meets any, let alone all three, of those tests. If Procon can give any specifics as to what was said and by whom, we will at your request investigate those statements and give our opinion as to whether there was justifiable reliance by the contractor. Based upon the information we have, however, there are no grounds for a reliance claim.

(2) Was the waste area moved from the location specified in the contract documents? If so, does such movement entitle the contractor to additional compensation?

It appears that the waste area is not precisely in the location specified in the contract documents. It does cover the area (between specified stations) called for but takes up a much larger area. It was necessary to expand the waste area because the amount of material

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substantially the same location as shown in the documents which were provided to bidders.

It was evident at the claims committee hearing that those who prepared Procon's claim had not been to the project site. A visit to the site makes it very apparent that the waste area is in the only location available. It is merely larger than planned because of the increased quantity of excavated material.

Robert Gunnell will in conjunction with project personnel remeasure the location and extent of the waste area. We will immediately inform you if the measurements reveal any change which may entitle Procon to additional compensation. At this time, however, it appears that the waste area was not moved, only expanded to accommodate additional material.

(3) Was the project different from that described in the contract documents to such an extent that the contractor is entitled to additional compensation? This question is often asked in the form of whether there was a "changed condition." It is substantially the same question as (1) above. The only difference is whether there was a statement within the contract documents, as opposed to without the contract documents, which misinformed the contractor as to the nature of the project.

It is obvious from a visit to the project site that each bidder knew, or should have known, the exact nature of the project and the material to be excavated. All of the material was exposed along the face of the pre-existing cut. Bidders are required by the contract documents to make their own investigation and evaluation of the site.

We have no doubt that the excavation was more difficult than Procon anticipated at the time of its bid. The difference between the expectation and reality is not, however, a fault of the contract documents. It results from a misjudgment by the contractor for which UDOT is not responsible. The choice of method of work is that of the contractor. It was not imposed or even suggested by the contract documents. Different methods of work would likely have been chosen by different contractors.

The only item in the contract documents which causes us any concern are the statements on the plans as to expected shrink and swell of material between specified stations. In this case the information was irrelevant to an evaluation of the project by bidders. We do not understand why such statements were placed on the plans. They are at best superfluous and at worst can be used by a contractor to mislead a judge or jury. Our past experience is that such statements can be misunderstood in the judicial process. It is often difficult for a judge or jury to understand all the intricacies of highway construction and such statements may become the basis for an award of damages to the contractor. We recommend that such statements not be included in the plans and specifications for future projects.

In this case, the best way to understand the nature of the project is to visit the site. We recommend that if trial of the case filed by Procon is necessary, the judge or jury be taken to the site.

If there is any additional information or evaluation you wish of the foregoing questions or any other matters related to the Clay Hills Pass project, we will be happy to respond to your inquiries. All members of the consulting team are available to assist UDOT in any way you desire.

Sincerely,



Don R. Strong

DS/jm



Robert D. Gunnell

REPORT

Subject: Contractor's Claim filed by Procon Corporation

Project: Clay Hills Pass

San Juan County

Project No. ER-052(1)

0.428 Miles of Grading, Drainage and Bituminous
Surfacing

The construction contract on the above-referenced project was awarded by the Utah Department of Transportation (hereafter "UDOT") to Procon Corporation (hereafter "Procon"). Procon has filed a claim against the UDOT in the form of a "request for equitable contract adjustment." UDOT retained a consulting team (hereafter "team") to review Procon's claim and prepare a presentation of UDOT's position at a claims committee hearing. The team consists of Ralph Rollins, Robert Gunnell, and Bradford Price from the engineering firm of Rollins, Brown & Gunnell, Provo, Utah; Norman Clyde of W. W. Clyde & Co., Springville, Utah, as an outside advisor from the highway construction industry; and Don R. Strong and Harold D. Mitchell, Springville, Utah, attorneys. The team has visited the project site and carefully reviewed Procon's various claims for additional compensation. This report is the result of that review and investigation.

INTRODUCTION

The subject contract called for the re-alignment of an existing roadway some 100 feet to the south. This was to be accomplished by widening a pre-existing cut. A portion of the material removed from the cut was to be used to widen the existing roadway and the balance was to be hauled to a designated waste area. The roadway was to be surfaced. Construction was to be completed within 90 working days. The original contract amount was \$719,000.00 based upon the bid prices and estimated quantities.

The contract with Procon was terminated by UDOT when the surety on the payment and performance bonds furnished by Procon became insolvent and Procon either chose not to or was unable to furnish other bonds. Termination was by mutual consent of the parties as of January 1, 1987. After termination, the work remaining to complete the project was done by UDOT with its own forces. The remaining work consisted of untreated base course, bituminous surface, flagging, delineators, painting, and delineators. The work was completed in the summer of 1987.

Because Procon agreed to the termination of the contract, this report does not deal with any claims which could have arisen from the termination.

The claim filed by Procon consists of several separate items. Before discussing each item separately, it is important to understand the basis upon which payment for roadway excavation was to be made to the contractor. That is by far the single largest pay item in the contract.

ROADWAY EXCAVATION

Summary Sheet No. 3 of the contract documents indicates that 175,377 cubic yards of roadway excavation were to be removed. Some 72,947 yards from the excavation was to be used in the relocated subgrade. This area of roadway was located east of the planned cut. The balance of the excavated material in excess of 72,947 cubic yards was to be placed in a designated waste area also east of the cut. The waste material was to be compacted. During construction, more than the originally planned quantity of 175,377 yards was removed from the cut. The balance not used in the roadway relocation was placed in the waste area.

State of Utah Standard Specifications for Road and Bridge Construction, 1979 edition (hereafter "SS") which is applicable to the subject contract defines roadway excavation as "excavation and disposal of all material not being removed under some other item. . . . [It] shall include . . . placing the material in the embankment in the locations . . . shown on the plan . . . and placing the material at such other locations established by the Engineer." (SS sec. 203.01). The amount of material excavated is to be measured based on the "method of average end areas in the original position. Roadway excavation in excess of the authorized cross section. . . shall not be paid for." (SS sec. 203.04). (See also SS sec. 109). Payment to the contractor is to be "at the contract unit price per cubic yard. . . ." (SS sec. 203.05). That requires a measurement by cross-section of the area to be excavated before construction and a similar measurement after the excavation is completed. The amount of excavation for which the contractor is entitled to be paid is determined by subtracting one set of cross-sections from the other. In effect, the contractor is paid for the volume of the hole which is left.

Under the Standard Specifications, all other measurements of the amount of excavated material are irrelevant. Measurements of the quantity of material as it is hauled or as it is placed do not matter. Shrink and swell of the material after removal likewise do not matter. Only the measurements of the excavated area are important.

In addition, Procon was required to meet certain compaction requirements for the material removed and placed in either the roadway or the waste area. The portion of the material used in the roadway embankment was required to be compacted to an "average density [of] 96 percent of maximum laboratory density" with no test "below 92 percent." (SS sec. 208.02). Wasted material was required to be compacted to 90% (see Special Provisions Sheet #11). Some construction contracts have a separate item where the contractor will be paid separately for compaction. The subject contract does not. "If no item is listed on the proposal for 'Compaction' . . . it should be considered a part of the 'Roadway Excavation' . . . and no additional compensation will be allowed." (SS sec. 208.04).

Similarly, Procon was required as a part of roadway excavation to prepare the subgrade in accordance with the plans and specifications. No additional payment was allowed under the contract for such work. (See SS sec. 209.05).

The quantity of roadway excavation did exceed that set forth in the estimate by 17.4%. Such an increase does not, however, entitle Procon to any adjustment in the unit bid price for that item. An adjustment is permitted only if the actual quantity is more than 25% greater or lesser than the estimated quantity. (See SS sec. 104.02.3).

In this case, the size of the fill or the waste area or the amount of time spent on compaction are not the basis for payment to Procon. The information supplied by Procon in its claim as to its estimating process, site investigation, strategy of the bid, etc. shows the prudence of the contractor but the measurement of payment is not affected.

The team reviewed the method of measurement used and calculations made by UDOT with regard to roadway excavation. We found them to be accurate.

CHANGED CONDITIONS

In addition to the method of payment covered by the specification, the team addressed the "changed conditions" alleged by Procon. A changed condition which may entitle a contractor to additional compensation may come about for many reasons. The team's investigation of the project site, however, revealed that the conditions during construction were the same as shown in the proposal and found during actual construction.

The first and most obvious condition to consider was the cut itself. The area to be excavated was entirely along the face of a pre-existing cut. The earlier cut had been made by Fife Construction Co. in 1970 as part of another construction project.

The excavation made by Procon was to extend the cut into the hillside with a "sliver" cut.

The nature of the material to be excavated by the contractor was completely visible from the top of the pre-existing cut to the bottom. The same condition exists today in that if another cut needed to be taken out, a contractor could see what the material looked like by visual inspection of the cut face made by Procon. Procon's estimators no doubt viewed (or at least should have viewed) the pre-existing cut to determine the type of material and based their bid on the same visible information that was available to all bidders. No additional tests were performed or material information about the material to be excavated given by UDOT.

Since the contractor is paid only for the material removed, UDOT will not and did not in this case specify the method of operation to be employed by Procon. The method of Procon on this project was viewed by the team on video tape and photographs as well as by reviewing the project diaries and other work reports. The comments from the documents were to the effect that Procon was concerned about the slow rate of production. The method of excavation and hauling was changed several times but the changes were the decision of Procon. They were not imposed by UDOT.

Procon was not the original low bidder on the subject contract. The apparent low bidder was rejected because of failure to meet minority business requirements which were part of the contract proposal. The bid tabulation shows several bidders in the same range as Procon. That indicates that many bidders saw the same site conditions and based their bids accordingly. The team did not talk to any of the other bidders, except to receive some information on the bid submitted by W.W. Clyde & Co., but it is obvious that the nature of the work to be done was available to all bidders and was apparent from a visual inspection of the project site. Bidders could have intended to use different methods to perform the work but all bidders knew or should have known the nature of the site.

CLAIM ANALYSIS

Procon alleges that UDOT's plans were defective in that they did not reflect the actual project as constructed. The claim makes several specific allegations which the team evaluated. In making such an evaluation, the team met with the project engineer, viewed the project site, and examined the documentation concerning the project. The response of the team to the specific claims made by Procon and recommendations to UDOT is as follows:

Claim I: Change of Designated Waste Area Location.

I-A. Change in Hauled Quantity.

Procon claims that the waste area was relocated from the position shown on the plans. The team's review of the project site revealed that there was no material relocation of the area. The size of the waste area was adjusted to accommodate the larger amount of material taken from the cut than was originally anticipated. The waste area remained immediately east of the cut where it was originally proposed.

There was no haul item in the contract for payment to the contractor. Moving the material is part of the unit bid price for roadway excavation. Procon's claim is for equipment, time and labor increased by percentages for overhead and profit. It is based on the assertion that they had planned to haul only 42% of the excavated material and actually had to haul all of it. The team's review of the matter reveals that any such expectation was unreasonable, even if there had been no change in the waste area location which Procon claims. All of the material removed from the excavation had to be placed so that it could be compacted in accordance with the specifications. Procon would not have been allowed to merely shove it over the edge to the waste area. Most of the extra for both men and equipment which Procon claims is the result of construction going beyond the expected completion date. The team agrees that there was a substantial amount of time involved with its associated costs. It is apparent, however, that the delay was caused by Procon's choice of equipment and method of work with the resulting low production rate.

I-B. Change in Compactive Quantity.

Compaction was required at 90% in the waste area and 96% average in the embankment. Those requirements were included in the proposal for contract and did not change. All of the excavated material was required to be compacted. Compaction was a part of the unit bid price for roadway excavation. The construction and use of access roads was part of the method of work chosen by Procon. They were built and used at the convenience of the contractor in its operation and no additional compensation should be paid therefor.

I-C. Added Topographical Obstacle.

The "coves" referred to in Procon's claim were part of the waste area as originally contemplated and compaction at 90% was a requirement. There was no change which would entitle Procon to additional compensation. The items claimed are obviously the result of the type of equipment chosen to make the compaction. Procon was responsible for choosing the equipment and method of operation which it believed would best meet the requirements of the contract.

I-D. Dozer Inefficiency.

Again, the method of construction used by the contractor was the choice of Procon. Any inefficiency was its responsibility. There was no material change in the waste area which affected the use of equipment.

I-E. Inefficiency of Haul Units.

The actual haul of material from the cut was no different from what should have been anticipated by Procon. It was no more difficult than was contemplated by the contract proposal. The only change was in the quantity which was excavated and had to be moved. Procon was paid for that extra work when it was paid for the actual quantity of material removed. Any inefficiency in use of the equipment was the result of Procon's choice of its operation method.

I-F. Extended Direct Costs.

This claim is for labor and equipment time allegedly caused by overrun of the anticipated construction time. The extra time required was the result of Procon's choice of method of work. The equipment and method employed did not generate sufficient production to complete the work when expected. UDOT is not responsible for any additional costs which are the result of such decisions by Procon. Any additional costs and time which were the result of the increased quantity of excavation were paid for when the actual quantity was paid for at the unit bid price.

I-G. Extended Field Costs.

This claim is identical to Claim I-F except that it is for different items. The only other difference is that it is even less well documented and highly speculative in nature. The team's response to it is the same.

Several of the separate areas in Claim I are for the use of the same equipment. It appears that Procon is attempting in the claim to double charge for the same equipment by listing it in separate areas of the claim.

Procon's total claim for change of designated waste area location is based on equipment delay, inefficiencies and extended use and extra time required to complete the excavation. To the extent that the extra time was caused by Procon's choice of equipment and method of work, the cost must be borne by Procon. To the extent that it is the result of the greater than expected quantity of excavation, Procon has already been compensated and is entitled to no additional amount. The team cannot justify payment of any amount under this claim and recommends that the

entire claim of \$585,143.33 be denied.

Claim II: Changed Subgrade, Latent Physical Condition and Change of Scope from Sta 862+00 to 867+00, plus or minus.

Procon had the same opportunity to view the existing cut prior to its bid as did the other bidders. The nature of the material to be removed was readily apparent by examining the face of the pre-existing cut. Procon submitted a bid for excavation based on that information as did all the bidders. No material information or representations as to the nature of the material were furnished or made by UDOT. The team does not disagree that difficulties which Procon may not have expected were encountered in the excavation. The project diaries clearly show that production was less than what Procon had hoped. UDOT is not, however, responsible for the expectations of the contractor nor the method of construction which it uses. The method of construction was the responsibility of Procon. The entire quantity of material removed was unclassified roadway excavation. Choosing the method for removing it and placing it as required by the contract was up to the contractor.

II-A. Inefficient Ripping Operations.

Procon was responsible for its excavation methods. The contract did not require the contractor to "rip", nor did anyone from UDOT require such action. It only required the contractor to remove material and move it to another place. The choice to "rip" was that of Procon. Payment is based on quantity of material removed. It is not based on the method used.

II-B. Inefficient Excavation/Loading Operations.

Procon was responsible for the method it chose to excavate and load the materials found on the site. The contract did not require any particular method nor was such a requirement made by any UDOT personnel. Payment is based on the unit bid price for quantity of material removed. It is not based on the method used.

II-C. Inefficient Loading Operation.

There was no change in the subsurface conditions. The material was not significantly different than it appeared to be from a surface examination of the pre-existing cut. The backhoe chosen by Procon as the loading unit was simply the wrong choice of equipment. It is the responsibility of the contractor to move the material with the equipment which it chooses to use. Payment is not based on the type of equipment required or actually used to load the material. The anticipated cost of doing so must be included by the contractor in its unit bid price.

II-D. Decrease in Loadability of Materials.

Procon was responsible to remove and break up the excavated material in such a manner as to be movable by whatever equipment it chose to use. Again, payment to the contractor is not based on how difficult the material may have been to remove, load, or haul. Once its unit bid price was accepted and became a term of the contract, any difficulty in removing and placing the material became the responsibility of Procon.

II-E. Blasting.

Neither the contract nor anyone from UDOT required any blasting. The choice to blast and the costs incurred is that of the contractor. It was up to Procon to determine the method it believed was most efficient to perform the work required by the contract.

Claim III: Changed Subsurface Condition and Latent Physical Conditions from Sta 852+00 to 862+00, plus or minus.

This claim is for the same kinds of matters as set forth in Claim II, only at a different location. There were no conditions which were not readily ascertainable from a physical inspection of the project site. The pay item in the contract is for unclassified roadway excavation. Difficulty in performing the contract items is the responsibility of the contractor after its bid is accepted.

Again, the various items included in Claims II and III are duplicates of each other and of some of the items included in Claim I. Even if all of the claims of Procon were accepted, it would not be entitled to all of the payment which it claims. There is an attempt to charged for the same equipment in more than one area of the claim.

The team could find no justification for Procon's claim of changed conditions. It is recommended that UDOT deny the entire amount of \$652,052.08 included in Claims II and III.

Claim IV: Failure to Respond to Time Extension and Change Requests.

Under the terms of the contract, Procon had a period of 90 working days from the notice to proceed in which to complete the construction, plus the ten days allowed by SS sec 108.06 after mailing of the notice. Notice to proceed was mailed on March 11, 1986. The project should have been completed by August 1, 1986, which was the 90th working day charged to the contractor (see weekly progress report #20 for week ended August 2, 1986). It was not, in fact, completed until 1987 after the contract with Procon had been terminated. Procon claims that it begin

requesting an extension of time as early as April, 1986. Other requests for such an extension were made in May, June, and October. No formal response was ever made by UDOT although such requests were under consideration at the time the contract was terminated. It appears, however, that an informal extension of time was granted by UDOT.

Procon's claim is that because there was no response from UDOT to its requests, it incurred additional expenses, mostly in the form of overtime wages, in an attempt to get the project completed within the contract time or at least in an attempt to minimize any liquidated damages which UDOT may have attempted to impose pursuant to SS sec 108.08. It also claims that the failure of UDOT to respond caused it to have scheduling problems as well as difficulties with its surety, although no amount is specified for such claims.

In evaluating this claim, the team first considered if Procon was entitled to an extension of time. The statement in the claim is that the extension was justified by the changed conditions which were encountered when construction began. Although it is not clearly stated, the team presumed that the changed conditions referred to in Claim IV included all of the changes set forth in Claims I-III. As noted above, the team found no such changed conditions. Procon, therefore, did not have a justified basis for a time extension. Even if UDOT had responded to the requests as Procon alleges it did not, the answer would have likely (and could rightfully have been) a refusal to grant the extension. Procon thus did not suffer any damages from the failure to respond.

The only extension to which Procon was entitled is that referred to in SS sec. 108.07 "due to increased quantities for items set forth in the contract. . . ." Such additional time is not discretionary. It "will" be granted by the Engineer. In the subject project, there was a substantial increase in quantity of roadway excavation. The request for bids estimated 175,377 cubic yards. The actual quantity excavated was 205,795 cubic yards. Based on the contract unit price for roadway excavation, that resulted in an increase of 10.6% over the estimated contract amount. Under SS sec. 108.07, Procon was entitled to an proportional extension of 10 working days. That would have resulted in a completion date of August 15, 1986. Procon was not, however, entitled to such additional time until "the time final quantities are determined. . ." (SS sec. 108.07). That could not be done until the final pay estimate for the project was completed. Any failure of UDOT to respond to a request for additional time based on that ground, while perhaps not good business practice, is not a breach of the contract. The response would have had to be that the amount of additional time, if any, could not be determined. Procon, as a party to the contract, is charged with knowledge of the Standard Specifications in regard

to that matter. It knew, or should have known, that it was entitled to additional time and cannot base a claim for extra expenses on a claimed lack of that knowledge.

The team found that most of the delay in completion was the result of Procon's inappropriate choice of equipment and method of work. No justification was found for payment of Claim IV. It is recommended that the entire amount of \$28,491.09 be denied.

Although UDOT has to this time not made any claim against Procon for liquidated damages under SS sec. 108.08, it should consider the possibility of doing so as a counterclaim or offset in any litigation which may result from this matter.

Claim V: Contributory to Damages; Defective and Incorrect Plans and Specifications.

The centerline profiles discussed in Claim V were those set forth in the bid. The profiles were office revisions but are the profiles actually bid on and constructed to. The office revisions were done prior to the bid and formed the basis of the contract. Shrink and swell factors were used in the plans to assist in determining the planned quantities. The pay item by specification is roadway excavation. Shrink factors and swell factors do not change the method of measurement used for excavation.

In any event, this claim is highly speculative and the damages claimed are largely a duplicate of those set forth in Claims I-III. The team recommends that the entire amount of \$51,025.00 be denied.

Claim VI: Failure to Make Timely Payments.

Procon claims that monthly progress payments were unjustifiably delayed and that such delay was a violation of a "time is of the essence" term of the contract. Most of the damages claimed are for "slow payments received and disruption of schedule" although Procon does not specify how that amount is calculated.

During the pre-construction conference there was a discussion of monthly payments. It was agreed that Procon would submit a request for payment to the project engineer on the first Saturday of the month for work which was done in the preceding month. The project engineer would then prepare the pay estimate with certification or other documents for transmittal to UDOT in Salt Lake City. Upon receipt in Salt Lake City, the estimate would be sent to accounting with normal processing for payment to Procon. Attached hereto is a summary received by the team is a document received from Darrus Middleton of UDOT's finance office showing the timing of each payment. The first column shows a

"Close Date" in each estimate. The next column is entitled "Preparation in the Field". The third column indicates the date the pay estimate was received in Salt Lake City. The fourth column shows the date the estimate went to accounting and the fifth column shows the date of payment. It must be noted that some payments were made by UDOT directly to subcontractors.

The contract, and in particular SS sec. 109.06, does not specify a time limit within which monthly payments must be made to the contractor. Nor does the contract specify that time is of the essence. In light of the contract language, the dates of payment appear to be a reasonable. Handling of the payment requests appear to have been of a routine and orderly nature. The specification was for monthly payments with unspecified time limits. The procedures for payment were known by all parties as explained in the pre-construction conference.

The team recommends that the entire amount of \$31,438.08 of Claim VI be denied.

Claim VII: Survey Error.

The cut was excavated as shown on the plans. No changes were made in the plans. The "daylighting" of the cut was always a contract requirement. The contractor is responsible to follow the specifications and contract. The team recommends that this claim of \$79,647.05 be denied in its entirety.

Claim VIII: Damages.

The items set forth in contractor Claim VIII are costs incurred because of delay in completing the project. Had Procon chosen an appropriate method of work and completed the job within the contract time, most of the expenses which it claims would not have been incurred. Although no liquidated damages were assessed against contractor, Procon did exceed the contract time. The team recommends that this claim of \$291,388.81 be denied in its entirety.

Claim IX: Lost Profits.

The amount claimed by Procon is a 15% markup of the additional costs set forth in its other claims. The claim is not really for lost profit but for an additional profit on the additional expenses which it claims. Procon is not entitled to any such additional compensation under contract law and the claim of \$355,822.17 should be denied.

Claim X: One (1) to Two (2) Foot Thick Asphalt.

The contract called for the obliteration of the existing highway. Procon claims that this work required more effort than it had anticipated. The highway had been patched several times due to settling of the embankment causing some areas to have thicker asphalt. The nature of the old highway was visible for all bidders to see. Neither the plans nor specifications represented or specified the condition or thickness of the existing pavement. The contract item was to obliterate it, whatever it may be (see SS sec. 212). The expected 3" thickness of pavement mentioned in Claim X is a typical cross-section of the new road to be constructed and is completely unrelated to the obliteration item. The team recommends that this claim in the amount of \$7,536.37 be denied.

Claim XI: Pipe Excavation Change to Structural Excavation.

The amount to be paid to Procon for excavating for CMP was the subject of a specific approved change order. That change order and the amount to be paid for the work described therein was agreed to by both Procon and UDOT. The amount of payment required by the change order has been paid. The team recommends that the additional amount of \$1,280.00 requested by Procon in this claim be denied.

Claim XII: Change in Contract Scope for Guard Rail Quantities

At the time the contract was terminated, the only work actually being done on the project was by Procon's guard rail subcontractor. UDOT was concerned about payment to the subcontractor. The choice of January 1, 1987, as the termination date was to protect the subcontractor and to insure payment would be made to him directly by UDOT. The payment to the subcontractor was part of the termination agreement. The work was completed and the subcontractor received payment directly from UDOT. Procon was never on the project again after the termination.

COMMENTS ON CLAIM

In addition to the specific items discussed above, the team wishes to make some general comments about the claim. Procon has submitted a claim based upon "blue book" values for equipment time. Actual costs and damages in the claim are very rare. There is also a great deal of duplication of the claim amounts between the various items.

SUMMARY


The claim itself sharply illustrates the difference in approach of UDOT and Procon to the contract. UDOT contends that the contractor was awarded the contract based on the prices it bid for the work items specified in the proposal. Most of the work involved the excavation of material from the side of a visible cut made in 1970 in another project. The specifications are very specific that the contractor would be paid for material moved from the cut to the embankment and waste areas. The material to be removed was visible to see. The cut is commonly called a "sliver" cut. It provided enough material for the relocation of the existing highway by use of a "sliver" embankment along the existing roadway. The balance of the material was wasted but was required to be compacted. The waste material served to buttress the embankment and stabilize the area. The work was performed because of slides in the area and the new alignment and the stability of the waste material was intended to help in the safety and design of the new road.

UDOT did not change its plans from those bid on by Procon. Some office revisions were made by UDOT but were part of the contract documents. There were no field revisions except those done by supplemental agreement. The project as constructed was essentially the project bid on by the contractor. Procon is bound by the Standard Specifications. Payment to the contractor must be according to the specifications unless there was extra work. Except for those items handled by supplemental agreement, the team found no extra work not covered by existing specifications. The team reviewed the termination of the contract and found the termination to be by agreement of the parties. The single subcontractor working at the time of termination was covered by the termination agreement and has been paid. The other claims are subject to the specifications and have been dealt with accordingly. Procon's claims for additional equipment, time, expenses, etc. are governed by the specifications. Those are terms of the contract and do not allow the team to recommend the award of any damages or extra compensation to Procon.

The consulting team recommends that no additional amount be paid to Procon and that UDOT deny all items included in the claim.

Submitted this 31st day of August, 1988.


Robert D. Gunnell


Don R. Strong

ER-052(1) CLAY HILLS PASS PROCON CORP

PROCESSING TIME FOR ESTIMATES

EST. NO.	CLOSE DATE	PREP IN FIELD	REC'D IN S.L.C.	TO ACCOUNT	PAID	WORKING DAYS	
1	4/5/86	4/7/86	4/10/86	4/10/86	1/28/86	16	
New computer system installation	2	5/3/86	5/5/86	5/20/86	5/23/86	6/2/86	21
	3	6/7/86	6/13/86	6/19/86	6/26/86	7/2/86	18
	4	7/1/86	7/3/86	7/7/86	7/9/86	7/17/86	13
	5	8/2/86	8/7/86	8/13/86	8/19/86	8/28/86	19
	6	9/6/86	9/8/86	9/12/86	9/17/86	9/23/86	12
	7	10/25/86	10/27/86	10/29/86	11/4/86	11/10/86	11
	8	12/30/86	12/30/86	12/31/86	1/6/87	1/12/87	7
	9	REDUCE RETENTION REQUESTED		1/13/87	1/15/87	1/16/87	4
Payment to D & K Const.	10	3/24/87	3/24/87	3/26/87	1/8/87	4/13/87	14
							No Money to Procon
Payment to Green Valley Reclamation	11	4/14/87	4/14/87	4/20/87	1/20/87	1/23/87	7
							No Money to Procon
Payment to D & K Const.	12	8/13/87	9/1/87	9/10/87	9/10/87	9/11/87	10
							No Money to Procon
Payment to Jerry Holliday	13	8/13/87	9/10/87	9/10/87	9/11/87	9/18/87	7
							No Money to Procon
Payment to Becho by Court	14	8/13/87	12/18/87	1/25/88	1/25/88	1/28/88	27
							No Money to Procon
	15	8/13/88	2/26/88	Final	sent	to	Procon

Ex. 61-p

--- 1. TRANSPORTATION WHEN IN LIES OF GOING TO DESIGNATED WASTE AREA

3. move 40,000 cubic yards of waste material from native site to waste area specified by contract documents:

Assume that material exhibits loose swell of 15%. There will then be 46,000 loose yards of material to move.

Using D8U dozer pushing 350 feet, chart indicates production of 350 loose cubic yards per hour per machine. Two machines used, one spending 10% of time ripping.
Uphill dozing gives increase factor of 1.2
Soft dozing gives increase factor of 1.2

46,000 loose yards ÷ (350 yards per hour × 1.5 machines × 1.2 × 1.2) gives 61 hours.

Adding 61 hours by efficiency factor of 83% gives 73 hours working time.

Grading done by D7 dozer, compacting done by self-propelled compactor.

Cost summary:

D155A dozer	73 hrs @	\$110.36 =	\$8,056
RD155A Dozer	73 hrs @	\$100.72 =	\$7,353
D7 Dozer	73 hrs @	\$96.18 =	\$7,021
Compactor	73 hrs @	\$52.50 =	\$3,833
Fuel Truck	73 hrs @	\$6.62 =	\$483
Supervisor & Truck	73 hrs @	\$44.01 =	\$3,213
Gradesetter	73 hrs @	\$35.41 =	\$2,585

Total cost of moving material by dozing to contract designated site:

\$32,544

Or \$0.81 per cubic yard

4. move 40,000 cubic yards of waste material from native site to waste area staked by UDOT:

Using D400 units carrying 17 cu yds (bank) per load.

Assume load time of 1.75 minutes.

From Chart, p. 407:

Going down, assume 72,250 pound load and 25% rolling resistance. This mandates 1st gear with maximum 3 mph. Assume average speed of 3.0 mph.

If travel distance is 1,200 feet, travel time down is then 4.55 minutes.

Assume dump time of 1.5 minutes.

From Chart, p. 407: Digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, BYU.
Machine-generated OCR, may contain errors.

Because only one-way traffic is available on haul road, round trip is limited by the wait at the top for the previous haul truck to reach the top of the haul road. Therefore, after the first load, the controlling times for round-tripping are descent time, dump time, and ascent time, plus waiting time for previous truck to clear one-way road. Round trip time is as follows:

Hauling time @ 3 mph	4.55
Dumping time	1.50
Return time @ 5 mph	2.73
Waiting time	4.78
Round trip time:	13.56 minutes

Use 14 Minutes per round trip.

loads required = 40,000 cu yds ÷ 17 =	2,353 Loads
time required = 2,353 X 14.00 minutes =	32,942 Minutes
=	549 Hours

Adding 549 hours by efficiency factor of 83% gives 659 hours working time.

7.5 yard loader comparable to Cat 988B.

Loading time required is one-half trucking time, or 330 hours.

Using Komatsu D155 dozer to push to loader:
Same 330 hours as loader.

Using 14G grader to maintain haul road:
Same 330 hours as loader, with 60% of time at standby.

Using water truck to allay road dust:
Same 330 hours as loader, with 60% of time at standby.

Using D7 dozer to spread fill:
Same 330 hours as loader.

Using self propelled compactor for compaction:
Same 330 hours as loader.

T SUMMARY-

Wheel loader	330 hrs @	\$ 130.25 =	\$42,983
DJB Truck	659 hrs @	\$ 94.62 =	\$62,355
D155A dozer	330 hrs @	\$ 110.36 =	\$36,419
14G grader (40%)	132 hrs @	\$ 63.41 =	\$8,370
Standby (60%)	198 hrs @	\$ 13.64 =	\$2,701
Water truck (40%)	132 hrs @	\$ 41.50 =	\$5,478
Standby (60%)	198 hrs @	\$ 5.03 =	\$995
RD155A Dozer	330 hrs @	\$ 100.72 =	\$33,238
Compactor	330 hrs @	\$ 52.50 =	\$17,325
Fuel Truck	330 hrs @	\$ 6.62 =	\$2,185
Supervisor & Truck	330 hrs @	\$ 44.01 =	\$14,523
Gradesetter	330 hrs @	\$ 35.41 =	\$11,685

11 cost of moving material by truck to UDOT stacked site:

ere were 205,700 cu yds of cut in the project. 76,000 cu yds were placed in the
adway embankment. 40,000 cu yds were to have been dozed into the waste area.
is leaves 89,700 cu yds that under the contract conditions would have been hauled
the designated waste area by articulated haul trucks. This was a short haul,
er flat, easily maintained ground.

e contractor was required, instead, to haul this material to the embankment area
r wasting. This required a much longer haul, but more importantly, the haul was
wn a very steep (average 30%) grade, which was very irregular and difficult to
intain.

move 89,700 cubic yards of waste material from native site to waste
ea specified by contract documents:

ing two D400 units carrying 17 cu yds (bank) per load.
terial then dumped over edge to compactor working below.

Assume load time of 1.75 minutes.

From Chart, p. 407:

Assume average haul distance of 600 feet, rolling resistance of 5%.

Chart shows 3rd gear, 21 mph.

Use 6 mph.

If travel distance is 600 feet, travel time away is then
1.14 minutes.

Assume dump time of 1.25 minutes.

From Chart, p. 407:

4th gear usable, 24 mph.

Use 8 mph.

For 600 travel distance, return time is 0.85 minutes.

Loading time:	1.75
Hauling time:	1.14
Dumping time:	1.50
Return time:	0.85

Round trip time: 5.24 minutes

Use 5.20 Minutes per round trip.

ds required = $89,700 \text{ cu yds} \div 17 =$ 5,276 Loads

e required = $5,276 \times 5.20 \text{ minutes} =$ 27,435 Minutes

oking time required = 457 Hours

ding 457 hours by efficiency factor of 83% gives 548 hours working time.

7.5 yard loader comparable to Cat 988B.

ling time required is one-half trucking time, or 274 hours.

g Komatsu D155 dozer to push to loader:

me same 274 hours as loader.

ing 14G grader to maintain haul road:
sume same 274 hours as loader, with 60% of time at standby.

ing water truck to allay road dust:
sume same 274 hours as loader, with 60% of time at standby.

ing D7 dozer to spread fill:
sume same 274 hours as loader.

ing self propelled compactor for compaction:
sume same 274 hours as loader.

BT SUMMARY-

Wheel loader	274	hrs @	\$ 130.25	= \$35,689
DJB Truck	548	hrs @	\$ 94.62	= \$51,852
D155A dozer	274	hrs @	\$ 110.36	= \$30,239
14G grader	110	hrs @	\$ 63.41	= \$6,975
14G grader	164	hrs @	\$ 13.64	= \$2,237
Water Truck	110	hrs @	\$ 41.50	= \$4,565
Water Truck	164	hrs @	\$ 5.03	= \$824
D7 Dozer	274	hrs @	\$ 96.18	= \$26,353
Compactor	274	hrs @	\$ 52.50	= \$14,385
Fuel Truck	274	hrs @	\$ 6.62	= \$1,814
Supervisor & Truck	274	hrs @	\$ 44.01	= \$12,059
Gradesetter	274	hrs @	\$ 35.41	= \$9,702

al cost of moving material by truck to designated waste site:

\$196,694

Or \$2.19 per cubic yard

move 89,700 cubic yards of waste material from native site to waste
a staked by UDOT:

ng D400 units carrying 17 cu yds (bank) per load.

Assume load time of 1.75 minutes.

From Chart, p. 407:

Going down, assume 72250 pound load and 25% rolling resistance.
This mandates 1st gear with maximum 3 mph. Assume average speed
of 3.0 mph.

If travel distance is 1200 feet, travel time down is then
4.55 minutes.

Assume dump time of 1.5 minutes.

From Chart, p. 407:

Returning, using 57,000 pound empty weight 35% rolling resistance.
This mandates 1st gear with maximum 6 mph. Assume average speed
of 5.0 mph.

If travel distance is 1,200 feet, travel time down is then
4.55 minutes.

truck to reach the top of the haul road. Therefore, after the first load, the controlling times for round-tripping are descent time, dump time, and ascent time. Round trip time is as follows:

Hauling time:	4.55
Dumping time:	1.50
Return time:	2.73
Wait time:	4.78
Round trip time:	13.56 minutes

Use 14 Minutes per round trip.

loads required = 89,700 cu yds ÷ 17 =	5,276 Loads	
time required = 5,276 X 14 minutes =	73,864 Minutes	0.013725
	= 1231 Hours	0.013723

Adding 1,231 hours by efficiency factor of 83% gives 1,477 hours working time.

7.5 yard loader comparable to Cat 988B.

Working time required is one-half trucking time, or 740 hours.

Using Komatsu D155 dozer to push to loader:

Same time 740 hours as loader.

Using 14G grader to maintain haul road:

Same time 740 hours as loader, with 60% of time at standby.

Using water truck to allay road dust:

Same time 740 hours as loader, with 60% of time at standby.

Using D7 dozer to spread fill:

Same time 740 hours as loader.

Using self propelled compactor for compaction:

Same time 740 hours as loader.

COST SUMMARY-

Wheel loader	740 hrs @	\$ 130.25	\$96,385
DJB Truck	1477 hrs @	\$ 64.62	\$95,754
D155A dozer	740 hrs @	\$ 110.36	\$81,666
14G grader (40%)	296 hrs @	\$ 63.41	\$18,769
Standby (60%)	444 hrs @	\$ 13.64	\$6,056
Water truck (40%)	296 hrs @	\$ 41.50	\$12,284
Standby (60%)	444 hrs @	\$ 5.03	\$2,231
RD155A Dozer	740 hrs @	\$ 100.72	\$74,533
Compactor	740 hrs @	\$ 52.50	\$38,850
Fuel Truck	740 hrs @	\$ 6.62	\$4,899
Supervisor & Truck	740 hrs @	\$ 44.01	\$32,567
Gradesetter	740 hrs @	\$ 35.41	\$26,203

Total cost of moving material by truck to UDOT staked site:

\$534,197

Or \$5.96 per cubic yard

IVER CUT CHANGE FROM 1/2:1 TO 1:1

e cut slope was indicated on the contract documents to be 1/2:1. The
ject was required to be cut at 1:1. The impact of this change was
erse where there was a small cut, as the height of the cut was made
h higher, and the amount of material removed was very small in relation
the surface area being worked. This case held from station 855+00 to
cut 861+50. Beyond that station, the volume excavated was very high in
lation to the surface area worked, and the cut height was not increased
dramatically.

e machine available and anticipated for excavation of this area was a
subishi MS380 hydraulic excavator on backhoe. The reach is 35 feet
tical and 39 feet horizontal, midway between a Cat 24E and Cat 345.

udge that this machine has the ability to excavate the material between
se stations at a 1/2:1 slope without assistance from other machines by
king it as many as three tiers. The haul trucks could work in the cut
a without additional haul roads required.

re were 42,960 cubic yards to be removed at a 1:1 slope as specified.

hine bucket has capacity of 3.50 cubic yards.¹²

m page 157, use a bucket fill factor of 75%.

ume a swell factor of 15%.

ume a cycle time of 0.67 minutes.

load each truck, 9 passes will be required by the backhoe. This requires
0.67 = 5.36 minutes

d rate is then 190 cu yds per hour.

960 ÷ 190 = 226 hours required.

iding 226 hours by efficiency factor of 83% gives 271 hours working time.

eking Sta 860 to Sta 865.

ume 700 feet on good, flat grade.

to hauling 17 bank yards per load.

Load	5.36 Minutes
Haul @ 6 mph	1.33 Minutes
Dump	1.50 Minutes
Return @ 8 mph	0.99 Minutes

TOTAL 9.18

Use 9.2 Minutes

160 ÷ 17 cu yds per load x 9.2 Minutes = 23,249 Minutes
= 387 hours

the controlling factor is the loading time of 226 Hours.

COST SUMMARY-

Backhoe	226 hrs @	\$ 85.19 =	\$19,479
DJB Truck	452 hrs @	\$ 94.62 =	\$42,768
D7 Dozer	226 hrs @	\$ 96.19 =	\$21,737
Compactor	226 hrs @	\$ 52.50 =	\$11,865
14G grader (40%)	90 hrs @	\$ 63.41 =	\$5,707
Standby (60%)	136 hrs @	\$ 13.64 =	\$1,855
Water truck (40%)	90 hrs @	\$ 41.50 =	\$3,735
Standby (60%)	136 hrs @	\$ 5.03 =	\$685
Fuel Truck	226 hrs @	\$ 6.62 =	\$1,496
Supervisor & Truck	226 hrs @	\$ 44.01 =	\$9,946
Gradesetter	226 hrs @	\$ 35.41 =	\$8,003

Total cost of moving material from sliver cut at specified 1/2:1 slope:

\$127,274

Or \$2.96 per cubic yard

Because the slope was changed to 1:1, it was necessary to excavate the sliver cutting a road up to the sliver section, then move the haul trucks up the slope to where the backhoe excavator could reach both the excavation area and haul trucks.

785 cubic yards now in excavation from Sta. 855+00 through Sta. 861+50.

Need road into cut 12 feet wide by 1,000 feet long
needs 4,000 cu yds to move.

100 cu yds per hour, requires 40 hours to doze.

Working-

Trucks carrying 17 cu yds per load.
Moving truck up hill to loading area:
Assume average distance up hill of 600 feet.

Uphill @ 3 mph	2.27 Minutes
Load	1.75 Minutes
Downhill @ 1.5 mph	4.55 Minutes

Flat haul to waste site.

Haul @ 6 mph	1.33 Minutes
Dump	1.50 Minutes
Return @ 8 mph	0.99 Minutes

TOTAL 12.39 Minutes

(Note: load time is significant as it is in "Critical Path")

85,785 cubic yards ÷ 17 cu yds/load X 12.39 Minutes/load

= 62,522 Minutes

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COST SUMMARY-

D155A dozer	40 hrs @	\$110.35 =	\$4,414
Backhoe	521 hrs @	\$ 85.19 =	\$44,905
DJB Truck	1042 hrs @	\$ 94.62 =	\$98,594
D7 Dozer	521 hrs @	\$ 96.18 =	\$50,110
Compactor	521 hrs @	\$ 52.50 =	\$27,353
14G grader 40%	208 hrs @	\$ 63.41 =	\$13,189
Standby 50%	313 hrs @	\$ 13.64 =	\$4,269
Water Truck 40%	208 hrs @	\$ 41.50 =	\$8,632
Standby 50%	313 hrs @	\$ 5.03 =	\$1,573
Fuel Truck	521 hrs @	\$ 6.62 =	\$3,449
Supervisor & Truck	521 hrs @	\$ 44.01 =	\$22,929
Gradesetter	521 hrs @	\$ 35.41 =	\$18,449

bal cost of moving material from sliver cut at specified 1/2:1
 spe:

\$297,365

Or \$3.47 per cubic yard

 ver cut summary-

There were 85,795 cu yds moved between Sta 855+00 and 861+50.
 The cost of moving this yardage is calculated to be
 \$3.47 per cu yd.
 The cost of moving this yardage at bid conditions is calculated
 to be \$2.96 per cu yd.
 This is a difference of \$0.51 per cu yd.
 Or a total of \$43,750

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the time of pre-bid jobsite inspection, UDOT engineer gave reason to believe that blasting would not be necessary to perform job. In fact, several layers of solid rock were encountered that could not be ripped. This occurred in part due to the increase of slope from 1/2:1 to 1:1. The following is an approximation of what the blasting costs would be given certain assumptions.

There were 205,700 cu yds of excavation performed in the job.

Assume that 20% of the excavated material consisted of rock that required blasting because it was too massive to rip.

This results in 41,140 cu yds of material to be blasted.

The price in Salt Lake City for blasting by the same subcontractor that performed the blasting on this job was \$1.25 per cu yd.

Rock labor is 30% of cost, and labor is 3X that in private work in Salt Lake, so a factor to adjust for labor is $(1+3 \times 0.30) =$

1.90 a factor of 1.90 for out of town work.

Also a factor of 1.20 for poor blasting conditions.
(Rock is fractured and difficult to contain blast pressure.)

Expected price per cu yd is then $\$1.25 \times 1.90 \times 1.20 = \2.85

Total blasting price then calculates to be

41,140 cu yds \times \$2.85 = \$117,249.00

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APPENDIX:

Dozing Vs. Long Haul-		
40,000 cu	\$5.96	\$238,400
	(\$0.81)	(\$32,400)
	\$5.15	\$206,000
Short Haul Vs. Long Haul		
79,915 cu	\$5.96	\$475,293
	(\$2.19)	(\$175,014)
	\$3.77	\$301,280
Sliver Cut		
85,785 cu	\$3.47	\$297,574
	(\$2.96)	(\$253,924)
	\$0.51	\$43,750
Blasting		
41,140 cu	2.85	\$117,249

TOTAL		\$668,279

Dazing Vs. Long Haul-		
40,000 cu	\$5.96	\$238,400
	(\$0.81)	(\$32,400)
	\$5.15	\$206,000

Short Haul Vs. Long Haul		
0 cu yds	\$5.96	\$0
	(\$2.19)	\$0
	\$3.77	\$0

Sliver Cut		
85,785 cu	\$3.47	\$297,574
	(\$2.96)	(\$253,924)
Extra	\$5.96	\$476,293
79,915 cu	(\$2.19)	(\$175,014)
	\$4.28	\$345,030

Blasting		
41,140 cu	2.85	\$117,249
		<hr/>
		\$668,279